IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mann-Campbell v. JUUL Labs Canada, Ltd.*, 2025 BCSC 771

Date: 20250514
Docket: S1910927
Registry: Vancouver

Between:

Owen Mann-Campbell and Robert Osborn

Plaintiffs

And

JUUL Labs Canada, Ltd., JUUL Labs, Inc. and Altria Group, Inc.

Defendants

Corrected Judgment: The text of the judgment was redacted at paragraph 249 on June 18, 2025

Before: The Honourable Justice Giaschi

Reasons for Judgment

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Counsel for Province of British Columbia:	P.R. Lawless, K.C.
Place and Date of Hearing:	Vancouver, B.C. December 4-8, 2023 and May 16-17, 2024
Place and Date of Judgment:	Vancouver, B.C. May 14, 2025

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Introduction

[1] This is an application for certification of a class action against JUUL Labs Canada, Ltd. ("JLC"), JUUL Labs, Inc. ("JLI") and Altria Group Inc. ("Altria") for, *inter alia,* damages for personal injuries suffered as a consequence of the use of JUUL branded e-cigarette devices. The plaintiffs allege the e-cigarette devices are harmful products but were falsely marketed as a desirable, safe and healthier alternative to smoking. The plaintiffs additionally allege that the defendants conspired together to addict a new generation to nicotine or, alternatively, conspired to maintain and expand the market for JUUL products using unlawful means, knowing that addiction and other injuries were likely to result.

[2] The application for certification is vehemently opposed by the defendants on every issue.

[3] For the reasons that follow, the certification application is adjourned to permit the plaintiffs to make further amendments to the notice of civil claim and to make amendments to the proposed common issues.

Notice of Application

[4] The notice of application for certification was filed on November 25, 2021.

[5] The proposed class is:

> All persons resident in Canada, except for the Excluded Persons, who purchased and/or used JUUL Products for purposes that were primarily personal, family, or household in Canada during the Class Period. The Excluded Persons are: (1) the Defendants and their officers and directors; and (2) the heirs, successors and assigns of the persons described in (1).

[6] The proposed class period is from August 1, 2018, to a date to be fixed by the Court.

[7] Attached as Schedule "A" to the notice of application is a list of 36 proposed common issues. An amended list of proposed common issues, containing 38 proposed common issues, was provided at the hearing.

Notices of Civil Claim

[8] The action is a proposed class action on behalf of persons who purchased and/or used JUUL e-cigarettes in Canada. It was originally commenced by notice of civil claim filed September 30, 2019, against only JLC and JLI (collectively the "JUUL defendants"). The notice of civil claim has been amended four times: on February 24, 2020, October 30, 2020, March 3, 2023 and October 20, 2023.

[9] I will briefly outline each amended pleading and then address the fourth and final notice of civil claim in more detail.

Original Notice of Civil Claim

[10] The original notice of civil claim alleged that: the JUUL defendants designed, manufactured and distributed e-cigarettes for sale in Canada and/or worldwide, including within the Province of British Columbia; the JUUL defendants represented their product was a safer alternative to smoking cigarettes and made various other misrepresentations concerning the safety of e-cigarettes; the JUUL defendants failed to adequately warn consumers of the risks associated with their products; and users of JUUL products experienced respiratory and pulmonary symptoms. Paragraphs 23-31 related to the named plaintiffs and alleged that, in reliance on the representations made in the public domain that e-cigarettes were safe, they each commenced use of e-cigarettes at the age of 18 and later developed various symptoms and injuries. The "Legal Basis" in the original notice of civil claim was negligence, failure to warn and breaches of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*], and of comparable legislation in other provinces.

First Amended Notice of Civil Claim

[11] On February 24, 2020, the first amended notice of civil claim was filed. The amendments consisted of additional factual allegations that JUUL products were designed to promote rapid addiction and were marketed to young people. The first amended notice of civil claim also included an allegation of conspiracy with Altria, although Altria was not then a party to the action. The "Legal Basis" section of the

first amended notice of civil claim was expanded to include breaches of the *Tobacco and Vaping Products Act*, S.C. 1977, c. 13 [*TVPA*], unjust enrichment, civil fraud and conspiracy.

Second Amended Notice of Civil Claim

[12] Pursuant to an order made by me on September 18, 2020, Altria was added as a defendant to this action and the plaintiffs were given leave to file a second amended notice of civil claim, which was filed on October 30, 2020.

[13] The second amended notice of civil claim: added allegations concerning Altria and its relationship with the JUUL defendants; added additional allegations about JUUL products being designed and manufactured to maximize nicotine delivery while minimizing certain negative side effects, which resulted in the rapid addiction of young users to nicotine; alleged the use of flavours was negligent; expanded on the allegations of deceptive marketing and advertising; expanded on the alleged misrepresentations; and, alleged that the deceptive practices continued despite regulatory warnings.

[14] In reasons released on October 14, 2022, in relation to whether this court had jurisdiction over Altria, I commented that the versions of the notice of civil claim up to that point in time did not appear to fully comply with the requirements of Rules 3-1 and 3-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*], in that they did not contain a concise statement of the material facts or a concise summary of the legal basis, were rambling and repetitive and contained much evidence (see 2022 BCSC 1807, at para. 6). Regrettably, the third and fourth amended notices of civil claim, continue that trend.

Third Amended Notice of Civil Claim

[15] The third amended notice of civil claim was filed on March 1, 2023. It substituted Robert Osborn for Jaycen Stephens as a named plaintiff, added some additional remedies under consumer protection legislation; added claims under the *Sale of Goods Act*, R.S.B.C. 1996, c. 410 [*SGA*], and similar legislation in other

provinces; and added claims under the *Health Care Cost Recovery Act*, S.B.C. 2008, c. 27 [*HCCRA*], and similar legislation in other provinces.

Fourth Amended Notice of Civil Claim

[16] The fourth amended notice of civil claim ("FANOCC") was filed on October 10, 2023. It is 41 pages in length and comprises 171 main paragraphs.

[17] I will now address only Part 1 of the FANOCC, the "Statement of Facts". I will address Part 3, the "Legal Basis" when I consider whether the pleading discloses a cause of action. However, to put the factual allegations in context, I note that the relief claimed in Part 2 is certification of this action as a class proceeding and damages (general, special and punitive). I further note that several causes of action are pleaded in Part 3. They are:

a) Negligence and failure to warn;

b) Toxic tort;

c) Breaches of the *BPCPA*, and of comparable legislation in other provinces;

d) Breach of contract and breaches of the *SGA*, and of comparable legislation in other provinces;

e) Breaches of the *TVPA*;

f) Unjust enrichment;

g) Civil fraud and conspiracy;

h) Breaches of s. 52 of the *Competition Act*, R.S.C. 1985, c. C-34; and

i) Recovery of costs under the *HCCRA*, and similar legislation in other provinces.

[18] Paragraphs 1-11 of the FANOCC provide a general description of the parties and include, *inter alia*, allegations that the defendants were the agents of each other

and conspired with each other and with Philip Morris USA in the design and marketing of the JUUL e-cigarette device.

> 6. At all material times, each of the Defendants hereinabove was the agent, servant, employee, partner, alter ego, aider and abettor, co-conspirator and/or joint venturer of each of the remaining Defendants named herein and were at all times operating and acting within the purpose and scope of said agency, service, employment, partnership, conspiracy, and/or joint venture, and each Defendants has ratified and approved the acts of each of the remaining Defendants.
>
> 7. The business of JUUL Canada, JUUL USA and Altria is inextricably interwoven with that of the other and each is the agent of the other for the purpose of manufacturing, marketing, and/or distributing the products manufactured by JUUL Canada and/or JUUL USA.
>
> 8. At times not presently known to the Plaintiffs, Altria conspired with JUUL Canada, JUUL USA and others, including Philip Morris USA, with respect to the design and marketing of the JUUL e-cigarette device, using tobacco industry research and years of Altria's industry experience to develop, produce and market a highly potent method of nicotine delivery, being the JUUL e-cigarette device.
>
> 9. In particular, the Defendants, including Altria, exploited regulatory loopholes and relied heavily on social media and other viral advertising tools to hook people, and in particular young persons, on its addictive e-cigarettes. To accomplish this, the Defendants, and each of them, adopted the same themes used by the tobacco industry in its longstanding, extensive advertising campaign to glamorize cigarette smoking while downplaying its addictiveness and deleterious health effects.
>
> 10. At all material times, the Defendants, and each of them, designed, manufactured, and distributed e-cigarettes for sale in Canada and/or worldwide.

[19] Paragraphs 12-33 of the FANOCC purport to address the "History and Background of JUUL". The allegations include:

a) In 2015, the defendants set out to addict a new generation of young people to nicotine;

b) The JUUL product was designed to appeal to young people;

c) The JUUL product was designed to quickly and severely addict young people to nicotine by delivering high concentrations of nicotine without a "throat hit" and which rendered the product "powerfully addictive and dangerous";

d) The defendants heavily promoted the product to young people through social media and marketing and promotion tactics long outlawed for cigarettes;

e) The defendants marketed the product as safe, fun and not harmful;

f) The defendants failed to warn that JUUL products were unsafe for anyone under 26 years of age and failed to warn of the serious risks of using JUUL products including,

i. severe nicotine addiction,

ii. increased risk of stroke, heart attacks and other cardiovascular injuries,

iii. permanent brain changes and changes in brain functionality,

iv. mood disorders,

v. heightened risk of cancer,

vi. decreased functionality of the endocrine system,

vii. a lowering of impulse control, and

viii. negative effects on fertility;

g) Since 2015, JUUL became pervasive in schools across the USA and Canada;

h) JUUL was launched in Canada in August 2018 and had 79% of the market by July 2019; and

i) In 2018, JUUL discontinued popular flavours and altered its marketing strategy in the USA but continued to sell “youth-friendly flavours” in Canada until January 2021.

[20] Paragraphs 26-30 and 34-38 of the FANOCC purport to address Altria and its involvement with JLI, including:

a) At para. 26-27, it is alleged that Altria became interested in JUUL in 2017 and that it acquired a 35% stake in JLI in December 2018;

b) At para. 34, it is alleged that Altria is the parent company of Philip Morris USA;

c) At para. 35, it is alleged that, pursuant to a 2018 agreement between Altria and JLI, Altria was to provide marketing and distribution support and regulatory guidance to JLI;

d) At para. 37, it is alleged that since 2017, Altria and the other defendants worked together as a joint enterprise;

e) At para. 38, it is alleged that on March 3, 2023, Altria announced the exchange of its 35% stake in JLI "for a non-exclusive, irrevocable global license to certain of JUUL's heated tobacco intellectual property"; and

f) At para. 38, it is also alleged that Altria "succeeded in its goal of addicting a new generation of Canadians to nicotine, to its long-term benefit".

[21] Additional allegations of a conspiracy are set out at paras. 28-30, and 36-38.

> 28. At times that are not presently known to the Plaintiffs, the Defendants also conspired with others, including companies related to and/or controlled by Altria, with respect to the design and marketing of their product.
>
> 29. The conspiracy described above was intended to cause harm to class members, in the form of addiction and/or other personal injury, and/or was unlawful, by virtue of being either contrary to consumer protection legislation and/or the Tobacco and Vaping Products Act, and the Defendants and their co-conspirators should have known in the circumstances that injury to the plaintiffs and similarly situated persons would be likely to result.
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> …
>
> 36. Prior to and after Altria's acquisition of a 35% stake in JUUL USA, Altria conspired with the other Defendants and other companies related to and/or controlled by Altria to expand the success of, and the market for, JUUL products. While the particulars of the conspiracy are not entirely known to the Plaintiffs at present, Altria worked with JUUL USA to establish high-level strategy as well as to promote, distribute, obtain regulatory approval of and sell JUUL products, and shield them from regulatory or public scrutiny, while misleading consumers, including Canadians, about the risks. Altria's

> efforts as outlined above contributed to the increased popularity of JUUL products, including their success in the Canadian market.
>
> 37. From at least 2017 forward. Altria and the other Defendants worked together as a joint enterprise and the effects of their partnership were felt by consumers on both sides of the USA-Canada border.
>
> 38. On March 3, 2023. Altria announced that it had exchanged its entire 35% interest in JULL for a non-exclusive, irrevocable global license to certain of JUUL's heated tobacco intellectual property. Through its conspiracy with, and assistance to, the other Defendants as described in paragraph 28 to 31 above, Altria has succeeded in its goal of addicting a new generation of Canadians to nicotine, to its long-term benefit.

[22] Paragraphs 39-60 of the FANOCC address how the design of JUUL products promote rapid addiction:

a) At para. 44, it is alleged that the defendants use a process to "produce a highly potent method of nicotine delivery" by "combining benzoic acids with nicotine to produce 'nicotine salts'";

b) At para. 46-48, it is alleged that the defendants manipulate nicotine pH, which reduces the "throat hit"; and

c) At paras. 47-60, it is alleged the reduced "throat hit" is consistent with an intent to market the product to young people and non-smokers, increases the risk of continuous inhalation, leads to higher rates of consumption, increases nicotine absorption, and magnifies the health risks of nicotine, all of which the defendants intended.

[23] Paragraphs 61-63 of the FANOCC allege that JUUL products use various flavouring chemicals that are not disclosed on packaging and have not undergone "typical toxicological evaluation" and are therefore untested.

[24] Paragraphs 64-86 of the FANOCC address the "Marketing and Advertising of JUUL". It is alleged that the defendants use strategies similar to those used by cigarette manufacturers to entice young people to use their product (para. 64). The strategies include:

a) Glamorizing and downplaying the addictive and deleterious effects of nicotine (para. 65);

b) Use of long-term viral marketing campaigns targeted at young people (paras. 67, 69, and 77);

c) Using “sex appeal” and “fun” imagery (para. 68);

d) Providing free samples and launch parties (para. 70);

e) Withholding information about the dangers of the product (paras. 71-72); and

f) Using “influencers” to “push their products on young people”, and paid affiliates (para. 78-80).

[25] At para. 73, it is alleged the defendants represented JUUL products were safe when they were not and that the defendants failed to inform users of the dangers of the use of the product. Paragraph 73 includes a list of items of which the defendants did not inform the user, which are collectively defined as the “Omissions”.

> 73. The Defendants represented that JUUL e-cigarettes were trendy, fun, an appropriate social activity for adolescents and young adults, safer than traditional cigarettes, and without any harmful short or long-term effects. Contrary to those representations, JUUL e-cigarettes deliver a highly addictive substance and exposes users to dangerous and harmful chemicals that have not received regulatory approval for their intended purpose (inhalation), and result in physical injury. In making its representations, the Defendants failed to inform the Plaintiffs and class members of the dangers associated with the intended use of its products particularized above and including (collectively the "Omissions"):
>
> a. The efficiency at which its products deliver nicotine to the user's bloodstream;
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> b. The actual nicotine dose the user would receive;
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> c. The abnormally high concentration of nicotine its products deliver to the user's bloodstream;
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> d. The increased potency and addictiveness of JUULSALTS, especially when used by young persons without prior exposure to nicotine;
>
> e. That as an adolescent or young adult, the user is exposed to potent levels of nicotine that will affect the user's pharmaceutical,

> physiological, emotional, and behavioural states in the short and long-term;
>
> f. That the user is exposed to a low concentration of freebase nicotine, which will allow non-smokers to consume high concentrations of nicotine without any negative side effects;
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> g. That through one JUULpod, the user is exposed to concentrations of nicotine comparable to a twenty-pack of cigarettes;
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> h. That the user is exposed to nicotine at a concentration approximately twice as high as that via traditional cigarettes;
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> i. That the user will experience an increased risk of nicotine abuse and addiction;
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> j. That its products are not a safer alternative to smoking traditional cigarettes nor have they been approved as a cessation aid;
>
> k. That the user is exposed to (via inhalation) other dangerous and harmful chemicals that, alone or in combination, may cause physical injury upon inhalation and/or continued inhalation;
>
> I. That the user's respiratory and/or cardiovascular system (but not limited to those systems) may be negatively impacted due to the short or long-term use of its products;
>
> m. That the user is exposing themselves to unknown long-term health impacts by using its products;
>
> n. That the user is exposed to flavouring chemicals that have not been approved for exposure via inhalation and that it may not be safe for the user to inhale aerosols containing those flavouring chemicals;
>
> o. That the user is exposed to flavouring and other chemicals that were not tested for their intended use and are potentially dangerous; and
>
> p. That the user is exposed to and inhaling aerosolized constituents, at temperatures produced by JUUL's e-cigarette, that have unknown long term health impacts.

[26] Further particulars of alleged misrepresentations by the defendants are set out at para. 115 of the FANOCC, including that JUUL products were safe and had no short or long-term harmful effects.

[27] Paragraphs 87-103 address various health warnings and notices made by the US Food and Drug Administration (“USFDA”) and Health Canada, including:

a) In April 2018, the USFDA requested information from JLI regarding, *inter alia*, its marketing;

b) In September 2018, the USFDA wrote to JLI requesting that prompt action be taken to address the use of JUUL products by youth;

c) In February 2019, the USFDA wrote to JLI about addressing the “crisis of youth use of JUUL products”;

d) In August 2019, the USFDA issued a statement about, *inter alia*, the harmful effects of e-cigarettes and the US Centers for Disease Control and Prevention warned of e-cigarettes and reports of respiratory and pulmonary issues;

e) In September 2019, Health Canada issued a public notice about the dangers of e-cigarettes and advised of reports of pulmonary illness and even death; and

f) In July 2021, Health Canada introduced regulations limiting the nicotine concentrations in e-liquids.

[28] In relation to these notices, the plaintiffs allege that in September 2019, in response to notices from the USFDA, the defendants halted their marketing campaign in the USA but continued the campaign in Canada.

[29] Paragraphs 104-109 include excerpts from the JLC website describing the JUUL products, the ingredients, and the pricing of a JUUL starter kit.

[30] Paragraphs 110-113 allege again that the defendants “marketed and sold e-cigarettes throughout North America, including within the province of British Columbia” and that the individuals who used e-cigarettes, including users of JUUL products, have reported respiratory and pulmonary symptoms.

[31] Paragraph 114 alleges the defendants represented vaping was safe and made misleading and/or deceptive statements, which are collectively defined as the “Representations”. The “Representations” alleged are:

- That their products are a tool to help adult smokers stop smoking;
- That smokers should "Make the Switch" despite the fact that JUUL products have never been approved as a smoking cessation device;

- That the Defendants' products are "totally safe";
- That the Defendants' products are not associated with any harmful short or long-term effects:
- That the FDA "was about to come out and say it was 99 percent safer than cigarettes";
- "JUUL labs was founded with the goal of impacting the lives of the world's one billion smokers by eliminating cigarettes";
- "No tar. No smoke. No ash." and other similar representations which imply that Vaping is safer than smoking;
- 59 mg/ml nicotine (5% strength/Taux de 5%);
- That one JUULpod is "approximately equivalent to one pack of cigarettes";
- Representations targeted to selling JUUL e-cigarettes to minors, including marketing of fruit-flavoured e-cigarette pods, social media campaigns, and other advertisements designed to induce purchase of JUUL e-cigarettes by minors, such as representations that portrayed the Defendants' products as trendy, fun. safe. and an appropriate social activity for adolescents and young adults; and
- Such other representations or statements as may be proven at trial (collectively, the "Representations").

[32] Paragraph 116 provides a summary of the claim, as follows:

> 116. The Plaintiffs bring this action against the Defendants, and each of them, based on their manufacturing of e-cigarettes, their disregard to the harmful effects of using their products, and their failure to adequately warn consumers of the risks associated with their products.

[33] Paragraphs 117-122 contain allegations relating to the named plaintiffs. In relation to both named plaintiffs, it is alleged they would not have purchased JUUL products had they been provided with accurate information of the possible health complications associated with vaping and that they were misled by the statements, representations and omissions of the defendants and by the advertising.

[34] In relation specifically to Owen Mann-Campbell, it is pleaded that:

a) He purchased and commenced using JUUL products in 2018 at the age of 18;

b) He immediately sustained injuries including shortness of breath, chest pain, coughing, increased addiction to nicotine, anxiety and depression and weight loss; and

c) In 2019, he was advised by his family doctor to stop using e-cigarettes.

[35] In relation specifically to the named plaintiff Robert Osborn, it is pleaded that:

a) He purchased and commenced using JUUL products in 2019 due to the representations made that JUUL products were safe; and

b) He immediately sustained damages, including addiction to nicotine, and first-time use of cigarettes to satisfy his nicotine craving.

[36] The relief sought is set out in para. 124 of the FANOCC. It includes general damages, special damages, punitive damages, relief pursuant to the *Competition Act*, relief pursuant to consumer protection legislation and recovery of health care costs.

[37] Paragraphs 151-153 address damages for negligence and breaches of the consumer protection and sale of goods legislation. The damages claimed are for personal injury, special damages, loss of income, costs of future care, and punitive damages.

Evidence

[38] The evidence on this application consisted of seven 4-inch binders comprising 32 affidavits, including eight expert affidavits, and two transcripts of cross-examinations. I do not intend to review all of the evidence but confine my review to what I consider particularly relevant.

[39] I additionally observe that on a certification application such as this, I am not to weigh the competing evidence or conduct a robust analysis of the merits of the claim.

Plaintiffs' Affidavits

[40] The named plaintiff, Owen Mann-Campbell, filed an affidavit made June 8, 2021. In this affidavit, he deposes:

a) He is 21 years of age and lives in Surrey, British Columbia;

b) He started smoking cigarettes at 14 or 15 years of age;

c) In 2016 or 2017, he started seeing online advertisements for JUUL vaping products, copies of which are included in his affidavit and which are in bright colours and depict youthful appearing models;

d) In 2018, he continued to see advertisements online and elsewhere for JUUL e-cigarettes;

e) The advertisements he saw were "bright and fun" and "often included young people using JUUL e-cigarettes";

f) The advertisements led him to believe JUUL e-cigarettes were a safe and healthy alternative to traditional cigarettes;

g) The advertisements he saw included representations that:

   i. Smokers should "Make the Switch";

   ii. JUUL e-cigarettes are "totally safe";

   iii. "No tar. No Smoke. No Ash";

   iv. "59 mg/mL nicotine (5% strength/Taux de 5%)"; and

   v. One JUUL pod is "approximately equivalent to one pack of cigarettes".

h) Because of the advertisements and his desire to quit smoking, he began to use JUUL e-cigarettes in 2018;

i) Almost immediately after commencing to use JUUL e-cigarettes, his cravings and need to use JUUL increased dramatically;

j) In late 2018 or early 2019, he was advised by his family doctor to stop using JUUL e-cigarettes. He found quitting extremely difficult; and

k) He would not have used JUUL e-cigarettes if the advertisements had mentioned how addictive they were.

[41] Mr. Mann-Campbell additionally deposes to his willingness to act as a representative plaintiff.

[42] The second named plaintiff is Robert Osborn. He filed an affidavit made August 25, 2021, in which he deposes:

a) He is 27 years old and lives in Fort Erie, Ontario;

b) Prior to 2019, he used no vaping devices and did not smoke cigarettes;

c) In 2018, he began seeing advertisements about JUUL vaping products;

d) The advertisements he saw for JUUL products were bright and fun, often included young people and contained representations leading him to believe JUUL e-cigarettes were safer than traditional cigarettes and did not pose a health risk. The representations included statements such as:

   i. Smokers should “make the switch”;

   ii. JUUL e-cigarettes are “totally safe”;

   iii. “No tar. No Smoke, No Ash”;

   iv. “59 mg/mL nicotine (5% strength)”; and,

   v. One JUUL pod is “approximately equivalent to one pack of cigarettes”.

e) He purchased and started using JUUL products in 2019;

f) Almost immediately, he had cravings to use JUUL and became addicted;

g) In 2021, he started to smoke cigarettes to satisfy his cravings for nicotine; and

h) He would never have purchased or used JUUL products if he had known how addictive they were.

[43] Mr. Osborn additionally deposes to his willingness to act as a representative plaintiff.

Uncontested or Minimally Contested Facts

[44] JLI is a Delaware company that designed, manufactured, marketed and sold JUUL branded e-cigarette devices since June 2015.

[45] JLC is a subsidiary of JLI and is the only entity licensed to sell JUUL products in Canada.

The JUUL System and Pods

[46] The JUUL system is an electronic nicotine delivery system (“ENDS”) or a vaping system. It consists of: a disposable pod pre-filled with a proprietary e-liquid solution containing nicotine among other things (the “JUUL pod”); a device that heats and vaporizes the e-liquid (the “JUUL device”); and a USB charger. The user of the device inhales the vaporized e-liquid.

[47] The JUUL system apparently has two unique characteristics; a high strength battery in the JUUL device and the inclusion of nicotine salts in the JUUL pods. These characteristics are alleged by JUUL to satisfy nicotine cravings in a way comparable to traditional cigarettes and to thereby promote its objective of getting adult smokers to switch to a less harmful means of satisfying their nicotine addiction. The same characteristics are alleged by the plaintiffs to rapidly addict a new generation to nicotine.

[48] JUUL pods were marketed in several flavours and with nicotine concentrations of 5% (59mg/mL) and 3% (35mg/mL). In April 2019, a JUUL pod with a concentration of 1.5% (18mg/mL) was introduced.

Marketing Campaigns

[49] JUUL was launched in the USA with a launch party in New York City on June 4, 2015. The launch party was attended by social media influencers. The advertisements for this event were in bright colours and included youthful-looking models. The pictures of this event, some of which were posted by JLI on its Twitter feed, depict young people enjoying themselves at the party, some of whom appear to be holding a JUUL device.

[50] Between June 2015 and October 8, 2015, JLI ran an ad campaign in the USA called the “Vaporized” campaign. This campaign included bright coloured advertisements depicting youthful-looking models. Mr. Dickey, the Chief Operating Officer of JLI (whose affidavit I address in more detail below), deposes that only “[s]ome of the Vaporized campaign advertisements had clear warnings and disclosures related to the nicotine content and age restrictions”.

[51] The Vaporized campaign ended in October 2015. It was followed by other marketing campaigns, including:

a) Smoking Evolved – from October 2015 to April 2016,

b) Hex – from April 2016 to September 2017,

c) Simply Satisfying – from September 2017 to May 2018, and

d) Make the Switch – from May 2018 to September 2019, which purportedly promoted JUUL products as an alternative to smoking.

[52] From April 2015 to November 13, 2018, JLI had social media accounts on Facebook, Instagram and Twitter and videos on YouTube. In August 2018, JLI’s Facebook and Instagram pages could not be accessed by a person who self-

reported as being under 21 and its YouTube videos could not be viewed except by a person who self-reported as being over 18. Additionally, from at least late 2017 to 2018, JLI paid for sponsored content with at least four bloggers and influencers.

USFDA Requests

[53] In 2016, the USFDA deemed ENDS products subject to its jurisdiction but deferred enforcement for certain products already on the market, including JUUL products.

[54] In September 2018, the USFDA wrote to JLI setting out concerns about underage use of JUUL products and expressly requested that JLI "take prompt action to address the rate of youth use of JUUL products". A similar letter was sent to Altria in relation to a competing ENDS product, MarkTen, that Altria was then marketing.

[55] On October 6, 2018, a meeting was apparently held between JLI and the USFDA at which a plan was presented of the steps "[JLI] would take to help address the mounting epidemic of youth addiction to tobacco products".

[56] On February 6, 2019, the USFDA, wrote to JLI and Altria, expressing concern that, after Altria's acquisition of a 35% interest in JLI, "many of JUUL's public statements seem inconsistent with its previous representations to the USFDA". A meeting was requested at which JLI was to "be prepared to explain how this acquisition by Altria affects the commitments you made to the USFDA about addressing the crisis of youth use of JUUL products". The letter continued:

> I am aware of deeply concerning data showing that youth use of JUUL products represents a significant proportion of the overall use of e-cigarette products by children. I have no reason to believe these youth patterns of use are abating in the near term, and they certainly do not appear to be reversing. Manufacturers have an independent responsibility to take action to address the epidemic of youth use of their products.

[57] On September 9, 2019, the USFDA sent a letter to JLI expressing deep concern about the epidemic rate of increase in youth use of vaping products, and noting that JULL products continued to represent "a significant proportion of the

overall use of ENDS products by children". The letter further suggested that JUUL's product designs and marketing campaigns were a direct contributor to youth usage of JUUL products. The USFDA referenced testimony given to the Subcommittee on Economic and Consumer Policy of the Committee on Oversight and Reform of the United States House of Representatives in July of 2019. The testimony was described as follows:

> As detailed further below, that testimony revealed JUUL engaged in a wide variety of promotional activities and outreach efforts to persuade potential customers, including youth, to use JUUL products. Witnesses testified, for example, that JUUL advertising saturated social media channels frequented by underage teens and that JUUL used influencers and discount coupons to attract new customers.

[58] The September 9, 2019 letter also raised concerns about the use of nicotine salts in concentrations "which potentially could increase the addictiveness of the products".

[59] The September 9, 2019 letter also raised concerns about JUUL's "Make the Switch" campaign and about a presentation JUUL made entitled "Switching Program". JUUL was warned that these constituted marketing of JUUL products as "modified risk tobacco products" without the appropriate order and in violation of the applicable statute.

> As detailed in a Warning Letter that FDA is issuing today, JUUL has marketed its products as modified risk tobacco products, without an appropriate FDA order in effect … in violation of section 91 l(a) of the FD&C Act. The Warning Letter noted that JUUL has referred to its products, for example, as "99% safer" than cigarettes, "much safer" than cigarettes, "totally safe", and "a safer alternative than smoking cigarettes." In addition, we are concerned that parts of the "Make the Switch" campaign and the 'Switching Program presentation to the Cheyenne River Sioux Tribe may also convey that switching to JUUL is a safer alternative to cigarettes, in that using JUUL products poses less risk or is less harmful than cigarettes.

Canada

[60] The marketing and sale of JUUL products in Canada are regulated by the federal government, provincial governments and municipalities. The applicable regulations have varied over time and by location.

[61] JUUL products first became legally available for sale in Canada in August 2018. At that time, the “Make the Switch” campaign and slogan were used to market JUUL products. Later, from August to October 2019, a nationwide marketing campaign (excepting Quebec) was implemented with the slogan “No, No, No” to indicate JUUL Products had no tar, no smoke, and no ash.

[62] JUUL products are sold in Canada through third-party retail outlets, wholesale distributors and online through the website JUUL.ca (except in Quebec). Third-party retail outlets have accounted for the majority of sales and such outlets are prohibited from selling to persons under the legal age in the particular jurisdiction.

[63] Direct sales of JUUL products from the JUUL.ca website have always been subject to an age verification system and to terms of service that have varied over time. The terms of service have always included clauses that: Ontario law would apply; the courts of Ontario had exclusive jurisdiction; and the user waived any claims against JLC. Until June 2022, the terms of service also included an express waiver of a visitor's right to participate in a class proceeding and a mandatory arbitration clause.

[64] The JUUL pods available for sale in Canada have varied over time and by geography.

[65] The nicotine concentration in JUUL pods has varied over time. It was originally 5% and 3%. In April 2019, a new pod was introduced with a 1.5% concentration. In July 2020, British Columbia prohibited the sale of 5% and 3% concentrations. In July 2021, federal regulations limited the nicotine concentration in all e-liquids to 20 mg/mL (approximately 1.5%).

[66] The flavours available in JUUL pods have changed over time. Upon launch in Canada, the available flavours were Mint, Virginia Tobacco, Cucumber, Fruit, Mango, and Vanilla. In 2019, "Golden Tobacco" was added as an additional flavour. In July 2020, British Columbia prohibited the sale of Mint, Cucumber, Fruit, Mango, and Vanilla flavoured pods. Since January 2021, JLC has sold only tobacco,

menthol and mint flavoured JUUL pods, although mint is prohibited in some provinces.

[67] It is noteworthy that Mango, Fruit and Cucumber flavours were banned in the USA in November 2018 but continued to be sold in Canada until 2020.

[68] The packaging of JUUL products in Canada has also varied over time. However, according to Tim Corkrum, the President of JLC, since being introduced in Canada, the packaging has always contained a skull and crossbones and warnings that the product contains nicotine, is addictive, and is not intended for minors, children, or underage persons.

[69] The number of JUUL devices sold in Canada from the launch of the product until the end of February 2023 is approximately 2.1 million, according to Mr. Corkrum.

JUUL Affidavits

[70] The main affidavits relied on by the JUUL defendants are those of Tim Corkrum and Dave Dickey, both sworn March 8, 2023. Mr. Corkrum is the president of JLC and has 20 years of experience in the industry with Philip Morris International. Mr. Dickey is the chief operating officer of JLI. Their affidavits address the history of the design, manufacturing, marketing and sale of JUUL products in the USA and Canada. Mr. Corkrum also addresses the relationship between Altria and JLI.

[71] Both Mr. Corkrum and Mr. Dickey stress that JUUL products are, and have always been, intended for adult smokers as a safer alternative to traditional cigarettes. Mr. Corkrum deposes that the mission of JLC is to transition adult smokers away from traditional cigarettes and to combat underage usage of JUUL products. Mr. Dickey deposes that adult smokers are and always have been the sole intended target consumer market for JUUL products. Among other things, he deposes that the 5% nicotine concentration was selected because it best mimicked the smoking experience.

[72] Both Mr. Corkrum and Mr. Dickey outline steps JLI and JLC have taken to combat the use of JUUL products by young people. Mr. Dickey deposes to steps taken by JLI, including:

a) JLI's marketing code has always contained guidelines to limit the appeal of JUUL products to young people;

b) In 2015, after the conclusion of the "Vaporized" campaign, JLI removed all model imagery from its social media accounts, reduced its social media profile, and rebranded without models but with testimonials of "mature, adult long-time smokers who had made the switch to JUUL";

c) The use of age verification systems (primarily self-reporting) on social media;

d) In response to a significant increase in underage use of e-cigarettes in the USA,

   i. JLI stopped marketing on social media in November 2018 and,

   ii. In 2019, suspended all promotional marketing and ceased production of flavoured and mint JUUL pods in the USA (although notably not in Canada until 2020); and

e) In September 2019, JLI suspended all advertising and promotion in the USA except for direct-to-consumer advertising.

[73] Mr. Corkrum deposes that JLC's marketing has always been directed at adult smokers and has never engaged in forms of promotional activities prohibited by law, such as lifestyle advertising, testimonials, sponsorship promotion, or promotions appealing to young persons. He further deposes JLC has never engaged in social media advertising, has never run television advertisements, has never used influencers or celebrity endorsements, and has never handed out free products.

[74] Mr. Dickey additionally deposes to the existence of counterfeit JUUL products and the sale of JUUL products in unauthorized channels. He "understands"

counterfeit and grey market products are regularly investigated and he "believes" some Canadians may have purchased such products or seen unauthorized marketing or promotion of such materials.

Altria's Involvement

[75] It is not disputed that as of December 2018, Altria had an ownership interest in JLI and entered into various agreements with JLI. In particular, the following facts are not disputed:

a) Altria is an American holding company with several subsidiaries that are involved in the tobacco industry. One such subsidiary is Philip Morris Inc.;

b) In 2017, in response to regulatory changes by the USFDA, Altria sought to acquire a pod-based nicotine delivery product and entered into discussions with JLI to explore options;

c) In December of 2018, Altria, through a subsidiary, acquired a 35% non-voting interest in JLI;

d) Also, in December 2018, Altria and JLI entered into a services agreement (the "Services Agreement") which was later amended in January 2020. The agreement provided for certain services to be provided by Altria to JLI. The services included marketing, distribution, and regulatory affairs services pertaining to the USFDA;

e) In November 2020, Altria's non-voting shares in JLI were converted to voting shares; and

f) In March 2023, Altria exchanged it 35% interest in JLI for certain intellectual rights and terminated the agreements with JLI.

[76] I addressed the evidence of Altria's involvement with JLI in my reasons related to jurisdiction (reported at 2022 BCSC 1807, aff'd 2024 BCCA 99). The evidence consisted primarily of the affidavits of Mr. W. Hildebrandt Surgner Jr., the

vice president, corporate secretary and associate general counsel of Altria, sworn December 29, 2020, and the affidavit of Kaitlin Longest, senior director, regulatory planning for Philip Morris USA Inc., sworn December 31, 2020. Both Mr. Surgner and Ms. Longest were cross-examined on their affidavits and the transcripts of those cross-examinations were in evidence. Additionally, a collection of emails between high-level executives of Altria and JLI were in evidence.

[77] I came to several conclusions on the jurisdiction application, namely:

a) That the plaintiffs had made out a good arguable case the pleaded facts could be proven (para. 77);

b) The fact that Altria had no presence in Canada was not determinative of jurisdiction, or even particularly relevant (para. 79);

c) The evidence of Mr. Surgner and Ms. Longest did not negate the involvement of Altria in the advertising or marketing of JUUL products in Canada, as neither of them had knowledge of what, if any, activities, direct or indirect, Altria engaged in within Canada (para. 88);

d) The evidence indicated a relationship between Altria and JLI that went beyond that of a mere shareholder to a company (para. 81). In particular,

    i. the evidence of Mr. Surgner and Ms. Longest fell short of establishing that Altria's services were provided only in relation to the distribution and marketing of JUUL products in the USA (para. 82), and

    ii. the emails and presentations of high-level executives were indicative of a relationship that was much more than a shareholder to a company in that they spoke of "collaboration", a "partnership", and "a process to ensure strategy alignment" (para. 83); and

e) The close relationship between Altria and JLI, supported the allegations of agency, joint venture and conspiracy.

[78] New evidence has been submitted on this certification application, namely: the affidavit of Mr. Dickey; several affidavits sworn by Brian Blaylock, who alternately describes himself as managing director corporate development for Altria Ventures Inc. and as vice president, strategy, planning and new ventures at Altria Ventures Inc., a subsidiary of Altria Group Inc.; and transcripts of evidence given in American proceedings by Mr. Nicholas Pritzker, JLI's second largest shareholder, and Mr. William F. Gifford Jr., the CEO of Altria. Altria summarizes their evidence at para. 29 of its written submissions. I paraphrase the main points as follows:

> (a) Altria purchased its interest in JUUL USA primarily because JUUL products were successfully converting cigarette smokers;
>
> (b) Altria first contacted JUUL USA in 2017 but discussion broke down because Altria wanted a controlling share and was only interested in the American business;
>
> (c) The parties re-started negotiations in October to December 2018 and only then did Altria obtain non-public information about JUUL USA's business;
>
> (d) During the negotiations the parties were competitors and a "clean team" was set up to protect confidential information;
>
> (e) Altria and JUUL USA were both aware that youth usage of JUUL products would negatively impact the ability of JUUL USA to procure FDA approval;
>
> (f) A partnership was not the nature of the transaction;
>
> (g) Altria had no control over JUUL USA's business; and
>
> (h) Altria and JUUL USA were both aware youth usage was a problem and Altria invested because it believed JUUL USA was combatting youth usage and would successfully address the concerns of youth usage.

[79] Mr. Dickey deposes that on March 3, 2023, Altria entered into an agreement and plan of merger with a different vaping manufacturer and exchanged its 35% interest in JLI for a non-exclusive, irrevocable global license to certain of JUUL's heated tobacco intellectual property. He further deposes that all other agreements between Altria and JLI and their respective subsidiaries were terminated.

[80] Mr. Blaylock was involved in the analysis of JLI as a potential investment for Altria and in the due diligence in relation to that investment. He confirms Altria relinquished its investment in JLI in 2023. He additionally deposes:

a) Altria first contacted JLI in 2017 about a potential investment;

b) It was not until October 2018 that Altria had access to how JLI was running its business;

c) The transaction was finalized in December 2018;

d) While representatives of Altria may have used the word “partnership” from time to time, the transaction was an investment;

e) Youth usage of JUUL products was one of the primary risk factors to the success of Altria's potential investment in JLI, as it would negatively affect JUUL’s premarket tobacco product application with the USFDA and could result in the withdrawal of JUUL products from the American market;

f) Neither Altria nor any of its subsidiaries provided any services to JLI after April 30, 2022;

g) Apart from fees for services provided to JLI, Altria did not receive any monies from JLI;

h) In all of his work in connection with the transaction, he never read or was told anything that suggested Altria played any role with respect to Canada, or provided services that impacted the sale of JUUL products in Canada; and

i) He does not “believe” that Altria: (i) played any role in the design, distribution, marketing or sale of JUUL products sold in Canada; (ii) ever had any agreement with JLI with respect to Canada; or (iii) was involved in any of JLI's online marketing or online sales.

[81] I note that the new evidence is, in essence, the same evidence as was before me on the jurisdiction application, but just given by different people.

Expert Evidence

[82] The parties have filed expert evidence of six experts. The experts retained by the plaintiffs are:

a) Max Valiquette, who provided two affidavits addressing the marketing of JUUL products and the cross-border effects of that advertising. He also provided a reply report in response to the expert reports and evidence of the JUUL defendants;

b) Dr. Judith Prochaska, who also addressed the marketing of JUUL products and opined on their addictive nature; and

c) Dr. Sid Katz, who opined on the adverse health effects of JUUL products and who also provided a report in response to the reports of the defendants' experts, Dr. Paustenbach and Dr. Henningfield.

[83] The experts retained by the JUUL defendants are:

a) Dr. Dominique Hanssens, who provided a report in response to those of Dr. Prochaska and Mr. Valiquette;

b) Dr. Jack Henningfield, who provided a report in response to those of Dr. Katz and Dr. Prochaska; and

c) Dr. Dennis Paustenbach, who provided a report in response to those of Dr. Katz and Dr. Prochaska.

[84] Although I will review the expert reports, I again note that on a certification application, I am not to delve too deeply into the merits of the claim.

Max Valiquette

[85] Max Valiquette is an expert in marketing and branding with over 25 years of experience in the industry. He prepared an expert report for the plaintiffs, which is

attached as an exhibit to his affidavit made August 3, 2021. In his report, he reviews the advertising and marketing of JUUL products and opines:

a) There is significant evidence to support that JUUL intentionally and effectively targeted young people, creating a business and a brand that was purpose-built to dominate the youth market;

b) JUUL was not initially marketed as an alternative to smoking for adults but was purposefully launched as a youth-directed vaping brand;

c) JUUL's activities in the USA, prior to its introduction into Canada, had a demonstrable and measurable impact on the Canadian market;

d) Pretty much any youth-targeted brand or business or cultural entity in the United States and any youth-targeted digital or social channels or activity … will have uptake with young Canadians;

e) … more than anything, a successful brand (especially one that is successful [to] young people) in the United States of America has a built-in market in Canada, a market of young people just waiting for the brand to be available here;

f) The [cross-border] phenomenon has only continued to grow as the internet has facilitated further exposure to youth culture and culturally resonant youth brands in the USA… This is such a significant phenomenon that US brands have won national Canadian marketing awards for the work that they have done before their products are even available in Canada; and

g) Having a great launch campaign in the US is a great way to build up pent-up demand for a brand when it is finally available for purchase by young consumers in Canada.

[86] At para. 63 of his report, Mr. Valiquette concludes his comments on cross-border marketing with the following:

> 63. While this phenomenon has existed as long as there has been marketing - young Canadians watched American broadcast commercials from American TV feeds 30 years ago - that no longer compares to the way this cross-border marketing works today. Because the Internet knows no geographic boundaries and young Canadians are following their favourite celebrities and influencers (most of whom are American) in their favourite social media channels, they are naturally much more exposed to American marketing and youth culture than ever before. It simply isn't possible to be a successful youth brand in the United States and not have demand from Canadian consumers. This is exactly why most American originating successful youth brands have a North-America-wide marketing strategy. Even if a brand doesn't have money for specific activities in the Canadian market, it can simply include Canada in its larger overall marketing strategy, knowing full well that their US-based marketing and advertising activities will trickle their way North of the border to find young Canadian consumers who are just as susceptible to their messages as young American consumers are.

Dr. Prochaska

[87] Dr. Judith Prochaska is a licensed clinical psychologist and professor in the Department of Medicine at Stanford Prevention Research Center and a member of the Stanford Cancer Institute. Among other things, she treats patients with nicotine addiction. She provided the following opinions in a report dated May 14, 2021:

a) E-cigarettes are now the most frequently used tobacco product among adolescents. Dramatic increases in their use in youth have followed the introduction of JUUL with its high-nicotine delivery products sold in North America. Current use of e-cigarettes is fivefold more prevalent in Canadian youth aged 15-19 and young adults aged 20-24 than in adults aged 25 and older. The disturbingly high level of near-daily and daily e-cigarette use among adolescents suggests a strong dependence on nicotine. JUUL has hooked a new generation of teens on nicotine;

b) JUUL's sleek, discrete design, attractive flavours, and patented nicotine salt technology have enabled its quick dominance of the e-cigarette market with particular appeal to young people. JUUL contains nicotine in the form of benzoate salt, which results in an acidic pH and allows for high nicotine levels to be rapidly inhaled and absorbed into the bloodstream, with less irritation, relative to the freebase nicotine that has traditionally been used in other e-

cigarettes. This innovation allows for inhalation of liquids with higher nicotine concentrations. Nicotine is the addictive drug in JUUL. One 5% JUUL pod delivers the nicotine equivalent to smoking about a pack of cigarettes;

c) Nicotine exposure disrupts the reward system and is associated with the loss of interest in normal, non-drug rewards. This effect is observed in teens even with nondaily or light use, suggesting its occurrence early in acquisition. With a lower threshold of drug effects relative to adults, adolescents experience symptoms of dependence at lower levels of nicotine exposure. The epidemiologic data from smoking indicate that nicotine exposure during adolescence is associated with more intensive use, a greater risk of addiction, more chronic use, and a lower likelihood of quitting relative to initiation at older ages. Research is still emerging on nicotine vaping effects in youth; however, e-cigarettes, such as JUUL, which deliver nicotine in a similar efficiency to that of cigarettes, are likely to have similar effects on the developing adolescent brain and with similar sustained patterns of use;

d) Tobacco product advertising and marketing drives positive product perceptions, intention to use, use initiation, and continued consumption. Young people are particularly susceptible to advertising and marketing effects. Advertising and marketing by JUUL and/or Altria Group between 2015 to 2019 has appealed to young people and has gone viral via social media. The result has been the enticement and engagement of new nicotine users. JUUL's advertising and corporate communications directed to consumers have explicitly and/or implicitly represented that JUUL products are less harmful than commercially marketed tobacco products;

e) JUUL product labelling directed to consumers would be reasonably expected to result in consumers believing the products are less harmful than combustible tobacco and contain a low level of nicotine. JUUL packaging also has driven health perceptions with its non-tobacco flavour pods. JUUL's

"limited edition" labelling on pod products has helped drive consumer demand; and

f) Altria's acquisition of a 35% interest in JUUL in 2018 brings together the leading youth initiation products for cigarettes and e-cigarettes. With Altria's market dominance, the partnership has gifted JUUL with Altria's sales, logistics, and distribution services, with access to new retailers and coveted prime shelf space in the US market; adroit marketing, lobbying, and legal expertise; and acumen for navigating regulatory affairs. Reciprocally, with JUUL, Altria has found a way to re-energize its appeal among young people and re-engage a future generation of replacement smokers.

Dr. Katz

[88] Dr. Sid Katz is a professor emeritus at the University of British Columbia in the Faculty of Pharmaceutical Sciences. He provided a report dated March 29, 2020, that addresses: the chemical components of JUUL products; the adverse health effects of inhaling JUUL products, including the affects on cells at a molecular level; and the unique affects of JUUL products on young people as opposed to adults.

[89] Dr. Katz provided the following opinions:

a) In addition to nicotine and benzoic acid, JUUL aerosols contain a blend of propylene glycol and glycerine, carrier solvents, and high concentrations of flavouring chemicals;

b) There are many adverse health effects associated with JUUL products. The lungs, heart and brain are particularly affected by the components of the inhaled vapours, which include Nicotine, benzoic acid and the chemicals present in the flavours;

c) There is compelling evidence in the medical literature that JUUL products cause significant damage to human cells at the molecular level by the production of highly reactive chemicals that can cause damage to cells,

proteins and DNA. The cells and tissues of the lungs, heart and blood system are particularly affected; and

d) The inhalation of JUUL products adversely affects youth users differently and more severely than adults. The developing brain appears to be extremely vulnerable to the effects of nicotine. A key reason why JUUL products are a unique threat to adolescents is the patented formula of nicotine, which makes it less harsh and easier to inhale for longer periods of time, increasing the potential for earlier and more significant nicotine addiction.

Dr. Hanssens

[90] Dr. Dominique Hanssens was retained as an expert by JUUL. He is a distinguished research professor of marketing at the UCLA Anderson School of Management. He provided a report in response to those of Dr. Prochaska and Mr. Valiquette. His report is mostly a criticism of the methodology, or lack thereof, of the plaintiff's experts. In summary, he opined:

a) The plaintiffs' experts,

   i. focused only on marketing communications and not product attributes, price, or access to product supply, all of which are important, if not crucial,

   ii. do not demonstrate that JUUL's marketing communications were a material driver of purchase and use decisions, and

   iii. have not shown there is a common method that can be used to determine if JUUL's marketing communications actually impacted purchase and use decisions;

b) The heterogeneity of users of JUUL products indicates there would be a variation in the responses to JUUL's marketing communications, a factor that has not been considered by the plaintiffs' experts;

c) The plaintiffs' experts assume incorrectly that JUUL's marketing communications were the only source of information available to consumers;

d) The plaintiffs' experts ignore that consumers had access to sources of information about JUUL products and health risks prior to the launch in Canada, including from Canadian health agencies, and consumers likely had different beliefs about the health and addiction risks of JUUL products;

e) The plaintiffs' experts ignore that different consumers perceive marketing communications in different ways, and many consumers are not affected by marketing at all. They also failed to offer any common method that evaluates whether JUUL's marketing communications were misleading to proposed class members, or whether they actually impacted any purchase or use decisions;

f) JUUL's marketing communications varied over time and across provinces, a fact not considered by the plaintiffs' experts. The disparate campaigns need to be evaluated separately and individualized inquiries are necessary;

g) The plaintiffs' experts have not considered whether or how the presence of warnings and disclosures on marketing communications and product packages would have led to differences in consumers' interpretations. Individualized inquiry is necessary to assess this;

h) The plaintiffs' experts conducted no empirical analysis of, and have not proposed a method for addressing, whether any Canadian consumers were ever exposed to JUUL's marketing communications in the US; and

i) The plaintiffs' experts have not conducted any analysis using any accepted methodologies in reaching their conclusions.

Dr. Jack Henningfield

[91] Dr. Henningfield was retained by the JUUL defendants to review and respond to the reports of Dr. Katz and Dr. Prochaska. He is vice president, research, health

policy, and abuse liability at Pinney Associates, and an adjunct professor in the Department of Psychiatry and Behavioural Sciences at Johns Hopkins University School of Medicine. He has over 40 years of research experience in tobacco and nicotine use.

[92] Dr. Henningfield was asked to answer the following four questions:

> 1. What role, if any, do ENDS play in tobacco harm reduction in Canada?
>
> 2. What role does nicotine play in cigarette use and, in the health-related effects of cigarette smoking?
>
> 3. How do ENDS in general, and JUUL ENDS in particular, contribute to a tobacco control approach?
>
> 4. Why do people decide to use JUUL and other nicotine products?

[93] Concerning the first question, the role of ENDS in tobacco harm reduction, Dr. Henningfield opined that such systems:

a) Emit far fewer harmful constituents and/or lower levels of the most harmful constituents than cigarettes and cigarette smoke;

b) Are predicted by leading experts, as well as by Health Canada and the USFDA, to reduce smoking-associated health risks in people who switch from smoking combustible cigarettes; and

c) Are recognized by Health Canada and numerous other national health agencies as effective in helping people quit smoking despite not being approved as smoking cessation medicines.

[94] Concerning the second question, the role of nicotine in cigarette use and the health-related effects of cigarette smoking, Dr. Henningfield opined:

a) Nicotine is the reason people smoke;

b) Nicotine, though not benign, is not a major contributor to debilitating disease and premature death in cigarette smokers or other nicotine product users;

c) Nicotine products exist along a continuum of risks, with cigarettes sitting on the far end of the spectrum, nicotine replacement therapy at the other end, and ENDS somewhere in between;

d) Nicotine is also the primary potentially dependence-producing or "addictive" constituent of both cigarettes and ENDS. However, what that means is different for different people, as most people who try ENDS or cigarettes do not develop addiction; and

e) The level of severity of nicotine addiction depends on a number of factors, including frequency of product use, daily intake, and the behaviour and habits of the user.

[95] In relation to the third question, how ENDS, and JULL products in particular, contribute to tobacco control, Dr. Henningfield opined:

a) The smoking experience is highly individualized, with smokers adopting behaviours (e.g., frequency, inhalation, puffing) that meet their needs and wants;

b) The reason ENDS have been effective is that they allow smokers to have individualized control over nicotine intake levels and patterns;

c) Despite the fact that ENDS are not approved smoking cessation products, they contribute to smoking cessation and are overall more effective than nicotine replacement therapy products. More than a decade of very active surveillance in Canada, the US, and elsewhere has demonstrated that ENDS contribute to smoking cessation and smoking reduction among individuals and at the population level, likely contributing to declining rates of current smoking among adults and youth;

d) Since ENDS have been adopted in Canada, adult and youth smoking rates have continued to decline to the lowest levels in many decades. These

findings are contrary to early concerns that ENDS might undermine prevention and cessation efforts; and

e) JUUL products, which deliver desired levels of nicotine in a design and format that smokers find acceptable, provide effective alternatives to cigarettes for smokers.

[96] Concerning the fourth question, why people may decide to use JUUL products, Dr. Henningfield opined:

a) The use of nicotine in various forms is globally persistent and pervasive in most countries and societies. This extent of use is due to many effects that individuals find personally useful, such as alerting, calming, and stress and boredom relieving effects. Addressing the needs and desires of cigarette smokers more effectively and acceptably has been a major focus of ENDS;

b) Cigarette smokers who use and purchase JUUL products do so for a wide variety of reasons, and there are many factors driving such use, including a person's prior and current use of tobacco and other nicotine products, and their desired daily nicotine intake. These factors change over time for each individual user as they seek to meet their individual needs;

c) How adult and underage consumers use and consume JUUL is also highly variable. Some discontinue use and some continue to use them in place of combustible cigarettes. Other people report use of JUUL occasionally and average about one pod per week. Such users would likely be taking less nicotine per day than the 5mg or so of daily nicotine intake that appears to be necessary to cause and sustain dependence. Switching behaviour varies widely and is affected by many different factors; and

d) There is no single reason or pattern of JUUL use. The use of these products is highly variable and depends on a number of factors relating to each individual's background and environment, product characteristics, and the interaction of the individual user with the product itself.

Dr. Dennis Paustenbach

[97] Dr. Paustenbach was retained by the JUUL defendants. He is the president of Paustenbach and Associates, a scientific research and consulting company. He holds a PhD in environmental toxicology from Purdue University and has over 35 years of experience in toxicological risk assessment. He was asked to respond to the reports of Dr. Katz and Dr. Prochaska and to provide answers to the following questions:

> 1. What ingredients comprise the e-liquids in a JUUL pod and how does the JUUL ENDS device operate?
>
> 2. What are the factors that a toxicologist would consider when attempting to characterize the health risks associated with the aerosolized ingredients emitted from a JUUL device?
>
> 3. Do you agree with the scientific basis for Health Canada's statement on its website that "... switching completely to vaping nicotine is less harmful than continuing to smoke [combustible cigarettes]?

[98] In answer to question 1, he deposes and opines:

a) JUUL e-liquid contains four primary ingredients: nicotine, propylene glycol, benzoic acid, and glycerol, with the rest of the formulation comprised of a small flavouring package;

b) The JUUL device is a closed temperature-controlled system with strict temperature controls that limit the production of harmful and potentially harmful constituents and other by-products;

c) Concerning the harmful effects of diacetyl in flavours, as referenced by Dr. Katz, he said it is likely that users of JUUL ENDS experience minimal to no exposure to diacetyl via product use. However, even if such users were exposed to diacetyl, such exposure would be so small as to present no appreciable health risks; and

d) Dr. Katz references vitamin E acetate as strongly associated with vaping-associated lung injury ("VALI"), however, JUUL contains no vitamin E acetate. As a result, the use of a JUUL device would not cause VALI in the user.

[99] In answer to question 2, He opines:

> Based on the above information, it is my opinion that it is not possible to characterize or portray the users of JUUL ENDS products as having similar risks of adverse health effects since each user has a different exposure profile. Each user, by their very biology, also has a unique set of factors that influence susceptibility to toxicological insult. Thus, while it is possible to state that a product is unlikely to cause harm with typical use patterns, it is not possible to generalize the potential health risks seen among persons with varying ENDS use and biological parameters, as Dr. Katz attempted to do in his report.

[100] In further answer to questions 2, he stated:

a) In response to Dr. Katz's opinion that formaldehyde, acetaldehyde, and acetone have been detected in JUUL aerosols, and may cause harm to JUUL users, he noted an assessment of the health risks required consideration of a number of factors including frequency and intensity of use, the chemicals present and their concentrations, and user characteristics;

b) The variability among users makes it difficult to state that individuals within a larger population have identical or otherwise equivalent potential for health effects with the use of JUUL. Users have different "puffing" and exposure profiles;

c) Various studies have reported that blood nicotine levels obtained by ENDS users are a similar, if occasionally slightly lower, approximation of blood nicotine levels obtained through combustible cigarette use; and

d) Differences in nicotine pharmacokinetics at the individual level make it difficult to widely generalize the exact effects of nicotine across ENDS users.

[101] In answer to question 3, whether he agreed with Health Canada that switching to e-cigarettes was less harmful than continuing to smoke traditional cigarettes:

a) He agreed with the statement and noted that virtually all relevant studies indicate that substitution of combustible cigarettes with ENDS should reduce

disease risk and support the assertion that ENDS use is less harmful than smoking traditional cigarettes;

b) He criticized Dr. Katz for not comparing the potential adverse health effects of JUUL relative to the harms caused by combustible cigarette use;

c) He addressed the well-known harmful effects of cigarette smoking and noted that these effects are due to the thousands of harmful constituents present in traditional cigarettes, virtually all of which are not present or are scarcely measurable in JUUL ENDS aerosols; and

d) He specifically opined that,

   i. Production of harmful or potentially harmful constituents ("HPHCs") are limited with JUUL products, and

   ii. Exposure to carbon monoxide, one of the most harmful constituents of combustible cigarette smoke, is unlikely to occur with a typical use of JUUL products.

Valiquette Affidavit #2

[102] Mr. Valiquette's second affidavit and report responds to the expert report of Dr. Hanssens and affidavits of Mr. Corkrum and Mr. Dickey. In summary, he opined:

> My opinion has not changed since reviewing the affidavits I have received. There is nothing that I reviewed that I believe is a substantive objection to anything that I wrote, and none of the new information that I have reviewed has altered my opinion.
>
> …
>
> 6. My fundamental contentions - that the Defendants rooted JUUL's brand identity in youth culture and adopted a look and feel of a brand with a youth market as its target, and that their conduct in launching and marketing JUUL is consistent with best practices in marketing a brand to young people - essentially went unchallenged. There was little (if any) contention or proof offered to contradict my earlier report and the examples with which I supported it.
>
> …

> 9. There are different ways to measure whether or not marketing is successful (and I will explore them in this document). Some success measures are extremely quantifiable; others are more anecdotal or quantitative, but no methodology exists to quantitatively measure the *intended* target of a brand or campaign. We can only try to see if a brand was *successful* at generating awareness or consideration or sales with said target. Exactly who is the target of a particular marketing campaign *can* be qualitatively evaluated by experts in the field. For example, in my own experiences I have spent a significant amount of time focusing on marketing to young people, in particular at my market research and marketing firm, Youthography.
>
> …
>
> 12. JUUL was clearly launched and marketed as a brand that was meant to be aspirational to young people. JUUL built a brand identity from launch that was rooted in a youthfully-relevant USP, as is clearly demonstrated by JUUL's "Vaporized" launch campaign, which primed the Canadian market (especially Canadian youth). The Defendants are in possession of numerous documents and reports that, if given the chance to review them, would provide me with the data and information needed to further support my underlying analysis.

Katz Reply Affidavit

[103] Dr. Katz's second affidavit sworn on April 2, 2023, responds to the expert reports of Dr. Paustenbach and Dr. Henningfield.

[104] Concerning Dr. Paustenbach's report, Dr. Katz observed and opined:

a) The statement from Health Canada about vaping being less harmful than smoking is incomplete. The full statement includes that vaping is not harmless and is not for young people, "especially susceptible to the harmful effects of nicotine".

b) Youth and teens who vape nicotine are particularly at risk to the harmful effects of nicotine including impeding brain development and a higher sensitivity to addiction;

c) No vaping products have been approved as therapeutic smoking cessation aids in Canada;

d) He did not have access to the information that Dr. Paustenbach referenced in relation to diacetyl and the various tests reportedly performed by JUUL and noted that concerns had been raised about JUUL Labs' research centre;

e) He did not have access to information about dose information and the toxins present in JUUL pods, but observed it would be possible to develop a study of the adverse effects of vaping, including on the lungs, respiratory and circulatory systems;

f) He disagreed with Dr. Paustenbach that the risks of vaping should be assessed relative to smoking traditional cigarettes noting that,

   i. The potential long-term health effects of vaping remain unknown,

   ii. The incidence of severe pulmonary illness associated with vaping is still being investigated,

   iii. Despite the stated goal of JUUL being to have smokers make the switch, studies show vaping is most popular among young people and young people who start vaping are three times more likely to go on to smoke traditional cigarettes;

g) He disagreed that the potential adverse health effects of JUUL products should be contextualized relative to the harms caused by combustible cigarettes because he does not believe that the health effects of smoking are greater than for vaping. He noted e-liquids contain other chemicals, the long-term risks of which are not known, and that the high temperatures associated with vaping can produce greater numbers and amounts of potentially harmful chemicals; and

h) He disagreed with Dr. Paustenbach that he failed to recognize the JUUL device was a device for current smokers to transition from cigarettes. In doing so, he noted that vaping devices have not been approved in Canada for such use.

[105] Concerning Dr. Henningfield's report, Dr. Katz noted that Dr. Henningfield agreed with the statements that, in the short and medium term, vaping poses a small fraction of the risks of smoking. Dr. Katz opined that even if this statement was true, it does not mean JUUL products do not cause harm. Dr. Katz then repeated some of what was contained in his first report about the adverse health effects of vaping.

Positions of the Parties

[106] I intend to address the positions of the parties when I consider the individual requirements for certification. At this time, I observe only that the plaintiffs submit the individual requirements for certification are met, whereas the defendants forcefully submit otherwise.

Analysis

Requirements and Tests for Certification

[107] Class proceedings are governed by the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. The three principle goals of the *CPA* procedure are behaviour modification, judicial economy and access to justice: *MM Fund v. Excelsior Mining Corp*., 2024 BCCA 163 [*MM Fund*]. The *CPA* is to be interpreted in a broad and purposive manner consistent with these goals: *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267 at para. 23.

[108] Section 4(1) of the *CPA* lists the requirements for certification and provides that the court must certify a proceeding as a class proceeding if the requirements set out therein are met.

> **4**(1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

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

[109] The s. 4(1) requirements are subject to different tests. The requirement that the pleadings disclose a cause of action, in s. 4(1)(a), is subject to the same test as that for striking a pleading on the grounds that it fails to disclose a cause of action, namely, assuming the pleaded facts are true, whether it is plain and obvious the claim cannot succeed*: Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 63 [*Pro-Sys*].

[110] The balance of the requirements set out in s. 4(1) of the *CPA* are subject to a different but still low threshold or standard of proof. The applicable test is whether there is some basis in fact establishing each of the remaining requirements. This was succinctly set out by Rothstein J. at paras. 99-100 of *Pro-Sys*:

> [99] The starting point in determining the standard of proof to be applied to the remaining certification requirements is the standard articulated in this Court's seminal decision in *Hollick*. In that case, McLachlin C.J. succinctly set out the standard: ". . . the class representative must show some basis in fact for each of the certification requirements set out in . . . the Act, other than the requirement that the pleadings disclose a cause of action" (para. 25 (emphasis added)). She noted, however, that "the certification stage is decidedly not meant to be a test of the merits of the action" (para. 16). Rather, this stage is concerned with form and with whether the action can properly proceed as a class action (see *Hollick*, at para. 16; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("*Infineon*"), at para. 65; *Cloud v. Canada (Attorney General)* (2004), 2004 CanLII 45444 (ON CA), 73 O.R. (3d) 401 (C.A.), at para. 50).
>
> [100] The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did, however, note in *Hollick* that evidence has a role to play in the certification process. She observed that "the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the

> class representative will have to establish an evidentiary basis for certification" (para. 25).

[111] In *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 at para. 134 [*Nissan*], Justice Griffin addressed the "some basis in fact" test. She explained it was a low threshold and did not involve "a robust analysis of the merits of the claim". She further explained it required "more than superficial scrutiny of the sufficiency of the evidence" but less than "the civil standard of a balance of probabilities".

> [134] This is a low threshold. The purpose of the requirement is to ensure there is a minimum evidentiary foundation to support the certification order: *Hollick* at para. 24; *Atlantic Lottery* at para. 138. Because the standard is simply to ensure that the action is suited to a class proceeding, it does not entail a robust analysis of the merits of the claim: *Atlantic Lottery* at para. 138; *Pro-Sys* at paras. 103, 105. However, the court must undertake more than superficial scrutiny of the sufficiency of the evidence: *Pro-Sys* at para. 103; *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at para. 27, leave to appeal to SCC refused, 39882 (17 March 2022). This standard requires "an evidentiary basis" to show the plaintiff has met the certification requirements: *Hollick* at para. 25. Such evidence does not have to be conclusive or satisfy the civil standard of a balance of probabilities, and the particular level of evidence that is sufficient is highly fact specific: *Sharp* at para. 27.

[112] Although the test for certification is not robust, the court nevertheless performs an important gatekeeping function, as expressed Justice Dickson at para. 15 of *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 [*Finkel*]:

> [15] The court performs an important gatekeeping function on a certification application. Although the merits of the claim are not determined and competing evidence is not weighed, certification operates as a meaningful screening device to ensure that only claims in the common interest of class members are advanced. As Justice Rothstein stated in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 at para. 104, for an action to be certified the s. 4(1) requirements must be met "to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of [the requirements] not having been met". While the threshold at the certification stage is low, merely symbolic scrutiny of the claim will not suffice: *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240 at para. 51.

[113] With these very general principles in mind, I now review each of the certification requirements.

Section 4(1)(a) – Cause of Action

Legal Principles

[114] The first requirement in s. 4(1) of the *CPA* is that the pleading discloses a cause of action. As indicated, this requirement is to be assessed without regard to the evidence and the test is whether it is plain and obvious that the claims, as pleaded, cannot succeed.

[115] In *Nissan* at paras. 38-39, Griffin J. observed that "the pleadings are to be analyzed liberally, and without consideration of the evidence" and that it is important to read the notice of civil claim as a whole. (See also, *G.D. v. South Coast British Columbia Transportation Authority*, 2024 BCCA 252 at para. 38)

[116] Where the pleadings are deficient at the certification stage, but can be cured by amendments, the certification application should be adjourned to allow such amendments: *Finkel* at para. 17; *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at paras. 44 and 118.

Negligence and Failure to Warn

[117] The allegations of negligence and failure to warn are primarily set out at paras. 125-128 of the FANOCC.

> 125. As the manufacturers, marketers, developers, distributors, labelers and/or importers of e-cigarettes, the Defendants were in such a close and proximate relationship to the Plaintiffs, and other class members, as to owe them a duty of care. The Defendants caused the e-cigarettes to be introduced into the stream of commerce in Canada, and they knew that any damages or adverse effects related to the e-cigarettes would cause foreseeable injury to the Plaintiffs and class members.
>
> 126. The Defendants, and each of them, owed a duty to the Plaintiffs and class members, who were reasonably foreseeable users of JUUL e-cigarettes, to exercise reasonable care when designing, testing, manufacturing, marketing, labelling, promoting, and selling e-cigarettes.
>
> 127. The Defendants, and each of them, owed a duty of care to the Plaintiffs and class members to ensure that e-cigarettes were safe and effective for their intended use. Particulars of the Defendants' negligence include:
>
> > (a) Downplaying, misrepresenting or under-reporting serious side effects and harmful complications of JUUL e-cigarettes;

> …
>
> (g) Knowingly designing inherently dangerous products that cause physical injury;
>
> (h) Knowingly designing, developing, formulating and manufacturing products that contained flavouring chemicals that had never been tested for the intended and ordinary use of JUUL e-cigarettes;
>
> (i) Failing to properly, adequately, and fairly warn consumers that JUUL e-cigarettes are extremely addictive …
>
> …
>
> (k) Manufacturing and/or marketing a product that they know, or ought to have known, had an unreasonably high risk of causing harmful health effects, including addiction and Pulmonary Disease;
>
> (l) Failing to warn, or appropriately warn, of the risk of illnesses, including risk of addiction and Pulmonary Disease, associated with JUUL e-cigarettes;
>
> …
>
> (s) Failing to implement a timely recall of JUUL e-cigarettes once the risk of illnesses, including Pulmonary Disease, were known to them and when it was known or ought to have been known that their products were not being used for their intended purpose;
>
> …
>
> (x) Marketing and advertising of their product in a manner that would likely appeal to minors …
>
> 128. The Plaintiffs and Class Members suffered loss or damage that was a direct and foreseeable consequence of the Defendants' negligence. These damages include, but are not limited to: (i) purchasing and using JUUL products when they would not have otherwise done so; (ii) nicotine addiction and other health issues; (iii) the cost of purchasing JUUL products and non-JUUL products to maintain their nicotine addiction; and (iv) other losses incidental to their addiction.

[118] To make out a claim in negligence a plaintiff must plead that: the defendant owed a duty of care; the defendant failed to meet the requisite standard of care; the plaintiff suffered injury; and damage was caused in fact and in law by the defendant's negligence: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3. In the context of a product liability claim, a plaintiff must plead a design or manufacturing defect or a duty to warn of the product's dangerous qualities and a corresponding failure to warn: *James v. Johnson & Johnson Inc.*, 2021 BCSC 488 at para. 96, aff'd 2022 BCCA 111.

[119] The JUUL defendants challenge the negligence pleading in various ways. They submit that:

a) Some of the damages claimed, such as purchasing JUUL products, are for pure economic loss and not recoverable;

b) The pleading contains no particulars of “other health issues”;

c) Claims for damages for increased risk of harm are not compensable;

d) Claims for future injury are not compensable;

e) The only compensable claim is one for addiction to nicotine; and

f) The claims for negligent design or manufacturing are doomed to fail for failure to allege it was feasible to design the products in a safe manner and for failing to provide particulars of negligence in the manufacturing process.

[120] I do not agree with most of these submissions. More specifically:

a) The FANOCC does particularize “other health issues”, albeit not within para. 128. The adverse health consequences are addressed in paras. 23, 112-113, 118 and 122. They include, in addition to nicotine addiction, various itemized cardio-pulmonary and vascular diseases;

b) The pleaded claims in negligence are not for pure economic loss. The plaintiffs plead actual harm including severe addiction to nicotine, and cardio pulmonary and vascular diseases and the relief claimed is general, special and punitive damages; and

c) The pleading is not deficient for failing to allege it was feasible to design the products in a safe manner or for failing to provide particulars of negligence in the manufacturing process. The plaintiffs have alleged the design and manufacturing was negligent in that flavours were used and chemicals added to allow the delivery of high concentrations of nicotine without a “throat hit”.

[121] I do, however, agree with the defendants that there must be actual harm or injury to support the claims in negligence and failure to warn. In *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 37 [*Atlantic Lottery*]

> [37] Causation of damage is a required element of the tort of negligence. As I have explained, the conduct of a defendant in negligence is wrongful only to the extent that it *causes* damage (*Clements*, at para. 16). While the plaintiffs allege that ALC had a duty to warn of the inherent dangers associated with VLTs, including the risk of addiction and suicide, those dangers are not alleged to have materialized. The plaintiffs do not allege that proper warnings would have caused them to spend less money playing VLTs or to avoid them altogether [Emphasis added.]

[122] Recently, in *Palmer v. Teva Canada Limited*, 2024 ONCA 220 a class action case, B.W. Miller J.A. expressed the same principle as follows:

> [47] Accordingly, there is no liability "in the air" and no right to be free from the prospect of damage: *1688782 Ontario Inc. v. Maple Leaf Foods Inc*., 2020 SCC 35, [2020] 3 S.C.R. 504, at para. 44. Negligence law simply does not recognize exposure to the risk of injury or harm, or the increased risk of injury or harm, as compensable: *Setoguchi v. Uber BV*, 2023 ABCA 45, at paras. 54-57, leave to appeal refused, [2023] S.C.C.A. No. 190; *Atlantic Lottery Corp.,* at para. 33. This means that, under s. 5(1)(a) of the *Class Proceedings Act, 1992*, there can be no viable cause of action in negligence without actual damage.

[123] Therefore, a potential plaintiff who has not suffered actual personal injury, such as addiction to nicotine or other health issues from the use of JUUL products, has no claim in negligence for economic losses or for potential future injury. However, the relief claimed in para. 128 of the FANOCC mostly alleges personal injury and consequent damages. It is only the claim for damages for "purchasing and using JUUL products when they would not have otherwise done so" that is unconnected with an alleged personal injury. This claim for damages must be deleted from the FANOCC.

[124] Insofar as the JUUL defendants are concerned, and with the deletion of the claim for damages for purchasing and using JUUL products, I am satisfied that the FANOCC satisfies the pleading requirements for negligence and failure to warn. Concerning negligence, the FANOCC alleges: the defendants owed users of JUUL products a duty of care; the defendants breached the requisite standard of care by,

inter alia, designing, manufacturing and marketing a product that was dangerous and harmful; the plaintiffs suffered injury including nicotine addiction, cardiovascular and pulmonary diseases and other health issues; and the plaintiffs suffered damages as a consequence. Concerning failure to warn, the FANOCC alleges JUUL products were dangerous; the JUUL defendants had a duty to warn of the dangers; and the JUUL defendants failed to warn of the dangers.

[125] Altria makes different submissions from the JUUL defendants. Altria submits that the FANOCC is defective in that it does not sufficiently identify what facts relate to what causes of action and to which parties. It says the FANOCC recognizes that Altria and the JUUL defendants are different entities and have a different relationship with putative class members, but then lumps all defendants together and makes blanket allegations against all. It says that, as a result, it is in the untenable position of not knowing the case it has to meet. In support of this submission, it refers me to *Canfor Pulp Limited Partnership v. Siemens Building Technologies Ltd*., 2016 BCSC 2089 at para. 22 where Voith J. (as he then was) wrote:

> [22] When several causes of action are being alleged against multiple parties, a statement of claim or third party notice must clearly identify what facts relate to what cause of action and to which party. It is inappropriate to lump defendants together in a pleading and to make blanket allegations against them, unless those defendants were in an identical relationship with the plaintiff. Such pleadings are necessarily imprecise, are overly general, and make it impossible to discern on what basis each of the defendants could be held liable. Such a pleading may be struck for failing to clearly define the issues of fact and law that are to be determined by the court and/or for being vexatious, prejudicial to a fair trial of the proceeding, and an abuse of process; see *Stoneman v. Denman Island Local Trust Committee*, 2010 BCSC 636 at para. 27; *The Campbell River Indian Band C.A*. at paras. 76-77; *Forde v. Interior Health Authority*, 2007 BCSC 1706 at paras. 17-18; and *Sahyoun v. Ho*, 2013 BCSC 1143 at paras. 53-54.

[126] In contrast, the plaintiffs refer me to *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 [*Valeant*], where Justice Harris wrote:

> [72] This case is similar to Watson, in which case a grouping of defendants was upheld by this Court: Watson BCCA at paras. 133–134. I do not accept that it is an inflexible rule with no exceptions that defendants can only be grouped together if they stand in an identical relationship to a plaintiff, and are alleged to have engaged in identical misconduct. The rules of pleading need to be applied in a more flexible and functional way, while

> ensuring that their fundamental objectives are furthered and not frustrated. Those objectives are not, in my opinion, frustrated by these pleadings. I do not think the judge's conclusion at para. 75 rests on reversible error:
>
> > [75] I see no error in the plaintiff's grouping of the defendants into classes such as manufacturer or distributor, and then indicating that these groups engaged in a certain activity that formed the basis of a cause of action. Groups of defendants are defined, and the actions of each group are set out in detail. The defendants can clearly discern which category they fall into.
>
> [73] Whether the material facts, read as alleged against each defendant falling within a group, give rise to a cause of action is another matter. Similarly, whether some material facts do not apply to the circumstances of a particular defendant, does not prevent it from knowing what it is alleged against it. In such a case, the proper response is to join issue and deny the fact in its own pleading.[1] If the alleged material facts do not give rise to a triable issue against a particular defendant, the rules provide for an application for summary judgment on all or part of the claim.[2] If a defendant considers that the allegation is otherwise deficient, it is entitled to apply for particulars: an application to be treated on its own merits.
>
> [Emphasis added.]

[127] I have some sympathy for the submissions of Altria. On the one hand, the FANOCC pleads that Altria became involved with JUUL in 2017 and 2018, which suggests that Altria could have had no involvement with the design, manufacture and marketing of JUUL products before 2017 or 2018. On the other hand, the FANOCC also alleges, at para. 36, that Altria was involved prior to its acquisition of a 35% stake in JUUL. The extent of that involvement, if any, is in issue.

[128] In view of the comments of Harris J. in *Valeant*, I cannot agree with Altria that it does not know the case it has to meet. Along with the other defendants, it is alleged to have designed, manufactured and distributed a harmful product and to have failed to warn users of the product of the dangers associated with it. Altria can raise an issue and deny these facts in its response to civil claim.

[129] Accordingly, I am satisfied that the pleadings disclose a cause of action against all defendants in negligence and, more specifically, for failure to warn. Paragraph 128 of the FANOCC will, however, need to be amended by deleting the claim for damages for "purchasing and using JUUL products when they would not have otherwise done so".

Toxic Tort

[130] At paras. 129-131 of the FANOCC, under the heading “Toxic Tort”, the plaintiffs plead that JUUL products contain toxins, that the defendants knew those toxins could result in injury and that the defendants are liable for the psychological and emotional harm caused and the costs of medical monitoring.

[131] The JUUL defendants submit that the claim of toxic tort is not a cause of action known to law.

[132] The plaintiffs did not address the toxic tort claim in their submissions at first instance or in reply.

[133] I have been provided with only one authority on this issue, *Clements v. Clements*, 2012 SCC 32, which merely addresses toxic agents within the context of negligence and causation.

[134] Given the lack of an authority establishing a cause of action in “toxic tort” and the failure of the plaintiffs to address “toxic tort” as an independent cause of action, I am not satisfied that the pleadings disclose any such cause of action. Certification is refused in respect of the “toxic tort” cause of action and the FANOCC will need to be amended by deleting this claim.

Breach of Consumer Protection Legislation

[135] The allegations of breach of the *BPCPA*, and consumer protection legislation of other provinces are set out at paras. 132-145 of the FANOCC. In summary, the plaintiffs plead that the defendants’ “solicitations, offers, advertisements, promotions, sales and supply of e-cigarettes” were “consumer transactions” within the meaning of the *BPCPA* (para. 132); constituted deceptive and unconscionable acts and practices contrary to s. 4 and 8 of the *BPCPA* (para. 133); and were relied upon by the plaintiffs who suffered loss and damages.

[136] The deceptive acts and practices are alleged to include:

a) The “Representations and Omissions” (which are pleaded at paras. 73 and 114);

b) The failure to properly disclose all material facts regarding the risks associated with use of JUUL products (para. 133);

c) Taking advantage of the plaintiffs’ inability or incapacity to reasonably protect their interest due to their ignorance, age and inability to understand the nature of the consumer transaction (paras. 135 and 137);

d) Failing to disclose the high potency of JUUL products and misrepresenting the strength of the nicotine contained in JUUL products (para. 136); and

e) Characterizing JUUL products as "hip, stylish, fun".

[137] Paragraph 142 of the FANOCC lists the consumer protection legislation of other provinces that the “Representations and Omissions” are alleged to have breached. In *Krishnan v. Jamieson Laboratories Inc*., 2021 BCSC 1396, aff’d 2023 BCCA 72 [*Krishnan*], Justice Branch summarized the causes of action and relief available under the various provincial consumer protection statutes at paras. 82-91.

[138] At paras. 143-145, the plaintiffs plead the remedies sought for breaches of consumer protection legislation. At para. 143, the remedies sought are declarations of deceptive and unconscionable practices and the return of the purchase price or, alternatively, damages. At para. 144, the plaintiffs seek declarations that the defendants contravened the *BPCPA*, an injunction restraining the defendants from further contraventions and statutory compensation, including disgorgement of profits.

[139] Section 1(1) of the *BPCPA* defines “consumer”, “consumer transaction” and “supplier, as follows:

> **1**(1) In this Act:
>
> “consumer” means an individual, whether in British Columbia or not who participates in a consumer transaction, but does not include a guarantor;
>
> ...
>
> **“consumer transaction”** means

> (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or
>
> (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a),
>
> and, except in Parts 4 and 5, includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer;
>
> …
>
> **"supplier"** means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by
>
> (a) supplying goods or services or real property to a consumer, or
>
> (b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",
>
> whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 *[Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit]*, includes a person who solicits a consumer for a contribution of money or other property by the consumer;

[140] Sections 5 and 9 of the *BPCPA*, respectively, prohibit a supplier from engaging in deceptive or unconscionable acts or practices in respect of consumer transactions.

[141] Section 10 of the *BPCPA* expressly provides that a consumer transaction is not binding if an unconscionable act or practice occurred.

[142] Section 171 of the *BPCPA* provides that a person who has suffered damage or loss due to a contravention of the Act may bring an action. Section 172(1) of the *BPCPA* further provides that a person may bring an action for a declaration that an act or practice of a supplier in respect of a consumer transaction contravenes the Act and for an injunction restraining a supplier from contravening the Act. Section 172(3) of the *BPCPA* additionally provides:

> (3) If the court grants relief under subsection (1), the court may order one or more of the following:
>
> (a) that the supplier restore to any person any money or other property or thing, in which the person has an interest, that may have

> been acquired because of a contravention of this Act or the regulations;
>
> …
>
> (c) that the supplier advertise to the public in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions that the court considers reasonable, particulars of any judgment, declaration, order or injunction granted against the supplier under this section.

[143] The defendants do not challenge the sufficiency of the pleading in relation to the claim for breaches of consumer protection legislation, although they do challenge whether the common issues in relation to this claim predominate over the individual issues, something I will address later.

[144] In *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72 [*WN Pharmaceuticals*], Justice Wilcock upheld a certification of a national class action that alleged breaches of various provincial consumer protection legislation, at paras. 32-34.

> [32] The judge noted that the provincial consumer protection legislation relied upon by the respondent differed to some extent from province to province, but that every such statute creates a cause of action against a supplier of consumer goods committing a prohibited, deceptive or unfair act or practice in relation to a consumer transaction. Every provincial consumer protection statute also provides remedies to consumers including restitution, damages or the restoration of property acquired by the manufacturer as a result of the prohibited conduct.
>
> [33] With one exception, the pleadings were sufficient to found a claim for damages and restoration orders because there was a clear nexus alleged between the payments made by the class and the funds received by the manufacturers, directly or indirectly, for the sale of glucosamine sulfate products. The judge found that a claim for restoration was adequately pleaded.
>
> [34] One inadequacy in the pleadings under this head was identified: a failure to plead compliance with the notice requirements of the Ontario *Consumer Protection Act*, 2002 S.O. 2002, c. 30, Sched. A. The judge granted leave to the representative plaintiff to amend the pleadings in order to address that lacuna.

[145] I note that none of the parties before me have suggested that the pleading is inadequate for failure to plead compliance with the notice requirements of the

Ontario Consumer Protection Act. If that is the case, as in *WN Pharmaceuticals*, I grant leave to amend to address that omission.

[146] In *Campbell v. Capital One Financial Corporation*, 2022 BCSC 928 [*Capital One*], Justice Iyer (as she then was) also certified a national class action that included a cause of action for breaches of consumer protection legislation in various jurisdictions. In doing so, she wrote:

> [114] The Claim pleads breach of the consumer protection laws of each jurisdiction. Consumer protection legislation must be interpreted generously in favour of the consumer it is intended to protect: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 at para. 37.
>
> [115] An essential element of each of these causes of action is that the defendant made misleading representations: *Krishnan* at para. 74. That means the plaintiff must have pleaded material facts that, if true, are capable of being found to be misleading representations. Capital One argues that Mr. Campbell has not done so.

[147] I am satisfied that the pleadings disclose a cause of action for breach of the *BPCPA* and of the consumer protection legislation of the other provinces.

Breach of Contract/SGA

[148] The legal basis for the plaintiffs' claim in breach of contract and breach of the *SGA*, is set out at paras. 146-150 of the FANOCC.

> 146. The Plaintiff and Class Members have a claim for recovery against the Defendants for breach of contract and pursuant to the *Sale of Goods Act,* R.S.B.C. 1996, c. 410 ("SGA"), s. 18, namely the implied condition that the goods are of merchantable quality and the implied warranty or condition as to the quality or fitness of the drug and its intended use.
>
> 147. As a result of the Representations and Omissions, the JUUL products sold and distributed by the Defendants were not of merchantable quality and were unfit for their intended use. Namely, the JUUL products sold and distributed by the Defendants contained undisclosed levels of nicotine which were abnormally high and abnormally potent and contained other harmful chemicals that had not been approved for use via inhalation and may cause physical injury if the Plaintiff and Class Members used JUUL products as intended.
>
> 148. The Plaintiff and Class Members also advance a claim pursuant to analogous legislation in the other Provinces and Territories:
>
> …

> 149. The Plaintiff and Class Members exercise their right, arising from the Defendants' breaches, to treat the sales contracts as repudiated. The Plaintiff and Class Members are entitled to a full refund of the purchase price they paid to the Defendant Retailers under the repudiated sales contracts.
>
> 150. In the alternative, the Plaintiff and Class Members are entitled to damages for the loss the Plaintiff and Class Members suffered as a result of the Defendants' breaches.

[149] The JUUL defendants submit that the plaintiffs have not disclosed a cause of action in contract and for breach of the *SGA* because any sales of product were made by non-party retailers. They refer to para. 111 of the FANOCC, where the plaintiffs plead:

> 111. The Defendants distributed their e-cigarettes to various retail outlets, which ultimately sold them to unsuspecting consumers, including the Plaintiffs.

[150] I also note that in para. 134, the plaintiff pleads that the defendants were "indirect sellers".

[151] The plaintiffs counter this submission by referring to para. 110 of the FANOCC where it is pleaded "[t]he defendants marketed and sold e-cigarettes …".

[152] It is trite law that the first requirement of a claim in contract is that there be a contract between the parties. The plaintiffs have not clearly alleged the existence of a contract between them and any of the defendants. At best, they have merely and inconstantly pleaded only that the defendants sold e-cigarettes. They have not pleaded that any of the defendants sold JUUL products to the plaintiffs. Indeed, given para. 111 of the FANOCC, it appears that any sales were through third-party retailers.

[153] It follows, in my view, that the plaintiffs have not properly pleaded a cause of action against the defendants for breach of contract and breaches of the *SGA*. The pleading must be amended to correct the ambiguities in the FANOCC.

[154] I will later address whether there is some basis in fact for the proposed common issues relating to breach of contract and breaches of the *SGA*. I presage

my conclusions in relation to those common issues by observing that there is no basis in fact that JLI or Altria entered into contracts for direct sales of JUUL products to consumers and putative class members.

Unjust Enrichment

[155] In the alternative to the claim in breach of contract, the plaintiffs plead a cause of action in unjust enrichment at paras. 155-158.

> 155. In the alternative to the claim for breach of contract, as a result of the Defendants' solicitations, offers, advertisements, promotions, sales and supply of e-cigarettes to the Plaintiffs and class members, the Defendants were unjustly enriched and benefited therefrom. The material facts are pleaded in paragraphs 39 through 86 and 104-116.
>
> 156. As a result of the Defendants' sale and supply of e-cigarettes, the Plaintiffs and class members suffered a corresponding deprivation.
>
> 157. There is no juristic reason why the Defendants' enrichment should be permitted, including at equity, under contract or pursuant to any statutory obligations.
>
> 158. The Defendants have accordingly been unjustly enriched to the extent of those amounts paid by the Plaintiffs and class members.

[156] The legal requirements for a claim in unjust enrichment are: (1) an enrichment of the defendant; (2) a corresponding deprivation suffered by the plaintiff; and (3) an absence of a juristic reason for the enrichment and corresponding deprivation: *Atlantic Lottery* at para. 69.

[157] The plaintiff submits that its pleading includes all of the required elements for a claim in unjust enrichment. The defendants, however, submit that the pleading discloses a juristic reason for the alleged enrichment, namely, the existence of a contract between the proposed plaintiffs and the retail sellers of JUUL products.

[158] I agree with the defendants that the existence of a contract is ordinarily a juristic reason for an enrichment and deprivation. However, that is not always the case. In *Atlantic Lottery,* at para. 71, it was acknowledged that if there was something to vitiate the contract, it may not provide a juristic reason.

> [71] Here, I do not have to go beyond the first stage of the analysis. The plaintiffs' own pleadings allege that there was a contract between ALC and

> the plaintiffs under which the plaintiffs paid to play VLTs. A defendant that acquires a benefit pursuant to a valid contract is justified in retaining that benefit (*Moore*, at para. 57). Nothing in the pleadings, apart from perhaps the allegations of criminal conduct that I have determined are bound to fail, could serve to vitiate the alleged contract between the plaintiffs and ALC. It follows that I agree with the appellants that the plaintiffs' unjust enrichment claim has no reasonable chance of success.

[159] Similarly, in *Tyk v. Graham*, 2017 BCSC 920 at para. 101, Justice Kelleher observed:

> [101] While the existence of a contract can be a sufficient juristic reason for enrichment, the benefit obtained must be within the scope of the contract. This was noted by Myers J. in *Noh v. Plaza 88 Developments Ltd., 2010 BCSC 1491*, aff'd 2011 BCCA 461 as follows:
>
> > [55] . . . Whether a contract [exists] is certainly a major part of the juristic reason analysis, but it is not the ending point. Where a valid and enforceable contract requires the plaintiff to benefit the defendant, the contract is, no doubt, a sufficient juristic reason for the enrichment. <u>On the other hand, where the benefit is bestowed outside the scope of the contract, or where a contract has failed for lack of consideration or frustration, the contract might not constitute a sufficient juristic reason.</u>
> >
> > [Emphasis added.]

[160] More recently, in *Valeant*, Harris J. wrote:

> [172] The Province's position is that it need not expressly plead that the contracts are void, voidable or otherwise unenforceable in order to leave open a path to unjust enrichment. As long as the contract is "voidable, or otherwise 'unenforceable in law and equity'", it might fail to constitute a juristic reason for enrichment: Kett v. Mitsubishi Materials Corporation, 2020 BCSC 1879 at para. 96, quoting Metzler Investment GMBH v. Gildan Activewear Ltd., 2009 CanLII 74223 (Ont. Sup. Ct. J.). The Province asserts that it is not plain and obvious that the wrongs alleged by the Province would not undercut the availability of the contracts as providing a juristic reason.
>
> [173] While I tend to agree that the pleading of an absence of a juristic reason justifying the enrichment is generic, material facts that might support the displacement of some or all of the contracts under which opioids were sold have been pleaded. It is necessary to read the unjust enrichment pleadings in light of the allegations of wrongdoing throughout the FANCC. At some stage, it is likely going to be necessary for the Province to provide detailed particulars of the foundation of its claim that some or all of the contracts are incapable of constituting a juristic reason for the appellants' enrichment. I do not think the judge fell into error in treating that as a matter of proof and a question for trial. I do not understand the appellants to have argued that the Province is unable to plead the legal foundation for displacing the contracts, just that it has not done so.

[161] As in *Valeant*, it is necessary to read the pleading of unjust enrichment in the light of the many allegations of wrongdoing contained throughout the FANOCC. In particular, the plaintiffs have specifically claimed restitution and rescission of the sales agreements in their claims under the *BPCPA* and similar legislation of other provinces. If that claim for rescission is made out, the sales contracts may not provide a juristic reason for the enrichment and deprivation.

[162] Moreover, I observe that in *WN Pharmaceuticals,* the class action in unjust enrichment against the manufacturer was certified in circumstances where the consumers had purchased product from retailers.

> [28] The judge held that, with one exception, the representative plaintiff had pleaded the requisite elements of an unjust enrichment claim. The representative plaintiff alleged the class members had made payments without consideration and that the sales contracts for the Glucosamine Products should be treated as repudiated, thus eliminating any juristic reason for the manufacturers' enrichment. The judge held that the representative plaintiff's failure to specifically plead that manufacturers (as well as retailers) had been enriched by the purchase price was an oversight. He gave the representative plaintiff leave to make an appropriate amendment to the notice of civil claim.

[163] Accordingly, I am satisfied that the pleadings disclose a cause of action in unjust enrichment.

Civil Fraud and Conspiracy

[164] At paras. 159-165 of the FANOCC, the plaintiffs set out the legal basis for the claims in civil fraud and conspiracy. The fraud claim is contained in paras. 159-162 and 165, as follows:

> 159. The Defendants' solicitations, offers, advertisements, promotions, sales and supply of e-cigarettes included false representations to the Plaintiffs and class members including, *inter alia,* with respect to the harmful effects of e-cigarettes, the addictive qualities of e-cigarettes, and the quantity of nicotine ingested when using e-cigarettes. The material facts are pleaded in paragraphs 39 through 86 and 104-116.
>
> 160. The Defendants knew or were reckless as to their knowledge of the falsehood of these representations.
>
> 161. The Defendants' false representations caused the Plaintiffs and class members to purchase and use e-cigarettes.

> 162. The Plaintiffs' and class members' purchase and use of e-cigarettes resulted in losses and damages.
>
> …
>
> 165. Particulars of the loss and damage suffered by the Plaintiffs and class members which were caused or materially contributed to by the aforementioned fraudulent representations of the Defendants include:
>
> - Personal injury;
> - Special damages for medical expenses and out-of-pocket expenses;
> - Loss of both past and prospective income;
> - Cost of future care; and
> - Cost of purchasing the Defendants' products fueled by nicotine
> - addiction.

[165] Surprisingly, the parties made no submissions before me in relation to the claim in fraud. They also did not address the allegations of fraud when they dealt with the common issue requirement under s. 4(1)(c). In fact, the plaintiffs' proposed common issues have no issues addressing fraud. I therefore do not intend to further address or certify the claim in fraud. This claim must be deleted from the FANOCC.

[166] The claim in conspiracy alleges both a predominant purpose conspiracy at para. 163 and an unlawful means conspiracy at para. 164.

> 163. The Defendants conspired with other tobacco companies, including Philip Morris USA, Inc. and/or others to orchestrate efforts to addict a new generation of persons to nicotine. The predominant purpose of the conduct of the Defendants and their co-conspirators was to cause injury to the plaintiffs and similarly situated persons, namely addiction.
>
> 164. Further, or in the alternative, the conduct of the Defendants and their co-conspirators was unlawful, by virtue of being either contrary to consumer protection legislation and/or the Tobacco and Vaping Products Act, and the Defendants and their co-conspirators should have known in the circumstances that injury to the plaintiffs and similarly situated persons would be likely to result.

[167] The allegations of conspiracy are also addressed elsewhere in the FANOCC.

a) At para. 6, it is alleged the defendants are, *inter alia*, co-conspirators;

b) At para. 7, it is alleged their businesses are “inextricably interwoven” such that each is the agent of the other;

c) At para. 8, it is alleged the defendants conspired to develop, produce and market JUUL products;

d) At para. 9, it is alleged they exploited regulatory loopholes and used social media to “hook” people to JUUL products;

e) At para. 12, it is alleged they set out to addict a new generation to nicotine;

f) At para. 29, it is alleged the conspiracy was intended to cause harm and/or was unlawful as being contrary to consumer protection legislation of the *TVPA*;

g) At paras. 26 -27, it is alleged that Altria became interested in JUUL in 2017;

h) At para. 35, it is alleged that, pursuant to the 2018 agreement between Altria and JLI, Altria was to provide marketing and distribution support and regulatory guidance to JLI; and

i) At para. 37, it is alleged that since 2017, Altria and the other defendants worked together as a joint enterprise.

[168] The unlawful means conspiracy pleaded in para. 64, alleges unlawful conduct that was contrary to consumer protection legislation, which I addressed above, and contrary to the *TVPA*.

[169] At para. 154 of the FANOCC, it is alleged the defendant breached the provisions of the *TVPA* as follows:

> 154. The Defendants' solicitations, offers, advertisements, promotions, sales and supply of e-cigarettes were contrary to the provisions of ss. 15.1, 19, 20, 23.3, 30.1, 30.2, 30.3, 30.41, 30.42, 30.43, 30.46, 30.5, 30.6, 30.7 and 30.701 of the *Tobacco and Vaping Products Act,* S.C. 1997, c. 13. The material facts are pleaded in paragraphs 39 through 86 and 104-116.

[170] The *TVPA* was enacted “to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases” [s.1]. The purpose of the Act in relation to vaping products is set out at s. 4(3) as follows:

> (3) The purpose of this Act with respect to vaping products is to support the objectives set out in subsection (1), to prevent vaping product use from leading to the use of tobacco products by young persons and non-users of tobacco products and, in particular,
>
> (a) to protect young persons and non-users of tobacco products from inducements to use vaping products;
>
> (b) to protect the health of young persons and non-users of tobacco products from exposure to and dependence on nicotine that could result from the use of vaping products;
>
> (c) to protect the health of young persons by restricting access to vaping products;
>
> (d) to prevent the public from being deceived or misled with respect to the health hazards of using vaping products; and
>
> (e) to enhance public awareness of those hazards.

[171] The *TVPA*, *inter alia*, regulates the promotion of tobacco and vaping products. The particular sections pleaded and relied upon by the plaintiffs include:

a) Section 15.1, which prohibits the manufacture or sale of vaping products, unless prescribed information about the health hazards and health effects are included;

b) Section 20, which prohibits the promotion of a tobacco product where the packaging is false, misleading or deceptive;

c) Section 23.3, which prohibits the promotion of a tobacco product where there are reasonable grounds to believe the device is appealing to young persons;

d) Section 30.1, which prohibits the promotion of a vaping product by means of advertising if there are reasonable grounds to believe that the advertising could be appealing to young persons;

e) Section 30.2, which prohibits the promotion of a vaping product by means of lifestyle advertising;

f) Section 30.3, which prohibits testimonials, endorsements and sponsorships;

g) Section 30.41, which prohibits promotion of a vaping product where there are reasonable grounds to believe that it could make the product appealing to young persons;

h) Section 30.42, which prohibits promotion of a vaping product including by means of packaging that is false misleading or deceptive;

i) Section 30.43, which prohibits promotion of a vaping product in a manner that could cause a person to believe that health benefits may be derived from the use of the product or from its emissions; and

j) Section 30.46, which prohibits packaging that could cause a person to believe that the product is flavoured if there are reasonable grounds to believe that the indication or illustration could be appealing to young persons.

[172] Canadian law recognizes two types of actionable conspiracy: predominant purpose conspiracy and unlawful means conspiracy. Both require an agreement between two or more persons: *Pro-Sys* at para. 72. Predominant purpose conspiracy is when: (1) the predominant purpose of the defendants' conduct is to cause injury using either lawful or unlawful means; and (2) the plaintiff does suffer loss due to the defendants' conduct: *Pro-Sys*, at para. 74. Unlawful means conspiracy is when: (1) the defendants' unlawful conduct is directed at the plaintiff; (2) they know or ought to know that their unlawful conduct is likely to injure the plaintiff; and, (3) the injury to the plaintiff does in fact occur: *Pro-Sys*, at para 80.

[173] JUUL submits that the pleading is defective in that it does not contain an allegation of damages suffered and, insofar as the claim is based on a predominant purpose conspiracy, it says there is no basis in fact that the defendants intended to inflict harm on the plaintiffs.

[174] Altria submits that the standard for pleading conspiracy is strict and that the plaintiffs have not pleaded material facts relating to the overt acts, unlawful conduct and causal harm required to support a cause of action in conspiracy against it. In particular, Altria says: the pleadings provide no dates, times or places of the alleged conspiracy; the pleadings fail to state exactly what Altria is alleged to have agreed to in furtherance of the conspiracy or what overt acts it actually did; and the pleadings fail to specify the precise nature of the alleged injuries and damages causally connected to the conspiracy.

[175] I disagree with the submissions of the defendants and am of the view that the pleading of conspiracy is adequate.

[176] The pleading contains allegations of Altria's involvement since 2017 and 2018. In my view, it is not necessary for the pleading to include the precise times and places of the alleged conspiratorial agreement. Indeed, rarely would plaintiffs have this information at the pleading stage.

[177] Insofar as the pleading is of a predominant purpose conspiracy, the pleading is sufficient. It contains allegations that the predominant purpose of the conspiracy was to cause injury, namely nicotine addiction, and also contains allegations that injuries were actually suffered, including addiction to nicotine and various other health issues.

[178] Insofar as the pleading is of an unlawful means conspiracy, it is also sufficient. The pleading contains the necessary allegations, namely: (1) that the acts of the defendants were unlawful as being contrary to consumer protection legislation and/or the *TVPA* and were directed at a new generation of persons not yet addicted to nicotine; (2) the defendants should have known in the circumstances that injury to the plaintiffs was likely to result; and (3) that injury to the plaintiffs did occur, namely addiction to nicotine and the other health effects pleaded including pulmonary disease.

[179] Accordingly, I am satisfied that the pleadings disclose a cause of action in conspiracy.

Breach of the Competition Act

[180] The allegations of breaches of the *Competition Act* are set out at paras. 166-169 of the FANOCC.

> 166. As a result of the Representations and Omissions about JUUL e-cigarettes, the Defendants breached section 52 of the *Competition Act,* RSC c C-34 (the "Competition Act") and committed an unlawful act because their Representations and Omissions:
>
> a. Were made for the purpose of promoting, directly or indirectly, the use of JUUL e-cigarettes;
>
> b. Were made for the purpose of promoting, indirectly or directly, any business interests of the Defendants;
>
> c. Were made to the public;
>
> d. Were made knowingly and recklessly; and
>
> e. Were false and misleading in a material respect.
>
> 167. The Representations and Omissions made by the Defendants include both an express misrepresentation to the Plaintiff and Class Members regarding the safety of JUUL products as well as a misrepresentation by Omission.
>
> 168. The Defendants should have known that statements regarding the safety of JUUL products were untrue; their [sic] were or should have been aware that JUUL products were not a safe smoking cessation device and that the use of JUUL products by consumers materially increased the risk of physical injury and likelihood that the consumer would also use cigarettes.
>
> 169. If the Plaintiff and Class Members had been informed of these risks, they would not have purchased or used JUUL products.

[181] Section 52 of the *Competition Act*, which is contained under Part VI, prohibits a person from making a false representation to the public for the purpose of promoting the supply of a product.

> **52(1)** No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> …

> **(3)** Subject to subsection (2), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) is deemed to have made that representation to the public.

[182] Section 36 of the *Competition Act* gives a right of action in damages to any person who has suffered loss or damage as a result of conduct contrary to a provision of Part VI.

> 36(1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> …
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[183] A *Competition Act* claim in the context of a class action proceeding was addressed in *Krishnan* by Branch J. and upheld on appeal. On appeal, Wilcock J. wrote:

> [30] The judge held that the pleadings sufficiently described a claim against the manufacturers for breach of s. 52 of the *Competition Act*. There was an allegation that the representative plaintiff would not have purchased the glucosamine sulfate product had she known it was not glucosamine sulfate. It was alleged that—in deciding to purchase the Glucosamine Products—the class members relied upon product labels. As a result of the misrepresentation, the class members allegedly suffered loss or damage by paying the purchase price. The judge considered the pleadings sufficient to identify a claim for false or misleading representations.

[184] Here the plaintiffs have pleaded false or misleading representations by the defendants and that they would not have purchased the product had they been informed of the risks. In my view, that is sufficient.

[185] I am satisfied that the pleadings disclose a cause of action for breaches of the *Competition Act*.

Health Care Costs Recovery

[186] At para. 170 of the FANOCC, the plaintiffs plead a claim for recovery of health care costs pursuant to the applicable legislation in force in the various provinces and on behalf of the various provincial governments. The applicable legislation in force in British Columbia is the *HCCRA*.

[187] It is not my intent to review each and every piece of legislation that is pleaded in the FANOCC. Suffice it to say that, with various degrees of differences, the referenced statutes permit the recovery of health care costs on behalf of provincial governments. In fact, some, such as the *HCCRA* oblige a personal injury claimant to include a claim for health care services.

[188] The defendants did not challenge the sufficiency of the pleading for health care costs recovery. I am satisfied that the pleadings disclose a cause of action for recovery of health care costs.

Section 4(1)(b) - Identifiable Class

Legal Principles

[189] The second requirement in s.4(1) of the *CPA* is that the plaintiffs demonstrate there is some basis in fact that there is an identifiable class of two or more persons. Bauman C.J. helpfully summarized the principles governing this requirement in *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82 [*Jiang*]:

> [82] In sum, the principles governing the identifiable class requirement may be summarized as follows:
>
> • the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
>
> • the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
>
> • the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
>
> • the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.

[190] In *Douez v. Facebook, Inc*., 2018 BCCA 186 at paras. 68-69, Justice Groberman addressed the need for a class definition to be as narrow as practical but without excluding persons with valid claims.

> [68] In order to fulfill its purpose, a class definition should be as narrow as practical, without excluding persons who have a valid claim. The problem of overbreadth was discussed by the Supreme Court of Canada in *Hollick v. Toronto (City)*, 2001 SCC 68:
>
> > [20] The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. …
> >
> > [21] The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: see W. K. Branch, *Class Actions in Canada (1996)*, at para. 4.205; *Webb v. K-Mart Canada Ltd*. (1999), 1999 CanLII 15076 (ON SC), 45 O.R. (3d) 389 (S.C.J.) (claim for compensation for wrongful dismissal; class definition overbroad because included those who could be proven to have been terminated for just cause); *Mouhteros v. DeVry Canada Inc. (1998*), 1998 CanLII 14686 (ON SC), 41 O.R. (3d) 63 (Gen. Div.) (claim against school for misrepresentations about marketability of students after graduation; class definition overinclusive because included students who had found work after graduation). [Emphasis added.]
>
> [69] A proper class definition will not include, within its ambit, large, identifiable groups of people who manifestly have no claim: see, for example, the recent decision of this Court in *Harrison* at paras. 43–44.

[191] As noted by Groberman J. in the above quotation, every class member need not share the same interest. (See also: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39.)

[192] Moreover, a class definition should include all members who may have a claim and is not overbroad merely because some class members may ultimately be determined to not be entitled to relief: *MacKinnon v. Pfizer Canada Inc*., 2021 BCSC 1093 at paras. 74 and 82 [*MacKinnon*]; *Jones v. Zimmer GMBH*, 2011 BCSC 1198 at para. 42, aff'd 2013 BCCA 21.

[193] Section 7 of the *CPA* specifically provides that certain matters are not a bar to certification, as follows:

> **7** The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not known;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[194] Thus, the fact that the class definition includes persons who are differently situated *vis-à-vis* the defendants is not a bar to certification. The fact that some class members have remedies that other class members do not is similarly not a bar to certification.

Discussion

[195] In their notice of application, the plaintiffs seek certification on behalf of the following class of persons:

> All persons resident in Canada, except for the Excluded Persons, who purchased and/or used JUUL Products for purposes that were primarily personal, family, or household in Canada during the Class Period.

[196] The class period is defined as of August 1, 2018, until a date to be fixed by the Court. The excluded persons are the defendants, their officers and directors; and the heirs, successors, and assigns of the defendants and their officers and directors.

[197] The plaintiffs submit that the proposed class is defined by objective criteria namely, the purchase and/or use of JUUL products. They say this definition allows class members to self-identify and determines objectively who is entitled to notice, who is entitled to relief, and who is bound by the final judgment. The plaintiffs further say there is rational relationship between the proposed class and the common

issues, in that the class is limited to persons who have purchased and/or used JUUL products and the common issues relate to whether there was a breach of the standard of care in relation to the manufacture, marketing, and sale of JUUL products, whether the defendants made the impugned misrepresentations and omissions in relation to JUUL products, and whether the defendants conspired to harm users of JUUL products.

[198] The plaintiffs further submit that it is not possible to narrow the class definition without excluding members who may have a valid claim and they say that it is not necessary for all members of the class to be similarly situated. More particularly they say the class members need not be identical and not every class member must have a provable claim.

[199] The JUUL defendants submit that the proposed class definition is "unworkable and incurably overbroad. They say the proposed class is overbroad because it includes:

> (a) Cigarette smokers who were addicted to nicotine before trying JUUL products (and thus have no claim for addiction);
>
> (b) Cigarette smokers who reduced their consumption of cigarettes in favour of JUUL products (and thus were exposed to fewer harmful chemicals than they would have otherwise been);
>
> (c) Persons who purchased and used JUUL products while perfectly aware of the addictiveness of nicotine and all associated risks;
>
> (d) Persons who purchased but never used a JUUL product (and who thus cannot have become addicted or suffered any injury);
>
> (e) Persons who purchased a JUUL product for the purpose of providing it to someone under the legal age to purchase it; and
>
> (f) Persons who used JUUL products, but not enough to lead to addiction or any kind of disease – someone who takes a single puff from a JUUL device cannot be part of a class claiming for addiction and personal injury.

[200] The JUUL defendants additionally say the class definition is overbroad and unworkable because:

a) It includes persons who used but never purchased JUUL products and such persons cannot seek restitution of the purchase price, having never

purchased, or claim in negligence, having not relied on the alleged misrepresentations or been affected by the alleged omissions;

b) It includes persons who purchased counterfeit products, who can have no claim; and

c) It includes persons who visited the online store of JUUL.ca and who are subject to an arbitration clause and class action waiver clause.

[201] The JUUL defendants also submit the class definition is not rationally connected to the claims since “mere consumption is not sufficient to impose liability”. In particular, they say:

a) A significant proportion of the proposed class would not have consumed JUUL products for long enough to suffer harm;

b) The class is not confined to individuals who used only JUUL products, but rather captures those who were or still are cigarette smokers and/or users of other vaping products;

c) The plaintiffs have not proposed a meaningful threshold of consumption; and

d) Sub-classes will not address the deficiencies in the class definition since there is not a single identifiable class whose claims raise common issues.

[202] The Altria defendants submit that the class is overbroad in that:

a) The class includes individuals who used a variety of JUUL products, including varied flavours and strengths;

b) The class includes purchasers who were not dissatisfied with the JUUL products, and in fact successfully used the JUUL products to quit smoking or to switch from combustible cigarettes to a vaping product, which products Health Canada has identified as a safer method of nicotine delivery;

c) The class includes persons who would have purchased JUUL products regardless of the alleged representations made by the JUUL defendants;

d) The class includes persons who saw different advertisements/marketing materials from those seen by the proposed representative plaintiffs, which may or may not have contained the same alleged representations; and

e) The class includes anyone who was addicted to nicotine before using JUUL products.

[203] Additionally, the Altria defendants submit that the plaintiffs have not established a basis in fact that anyone purchased JUUL products in Canada and suffered damages as a result of anything that Altria did or in reliance on any representations that Altria made.

[204] Alternatively, Altria submits that there should be a subclass for putative class members who purportedly have a common claim against Altria.

[205] I address, first, the defendants' submission that the class definition is overbroad because it includes persons who purchased but never used JUUL products and, conversely, persons who used but never purchased JUUL products. This submission assumes that "and/or" in the class definition should be read simply as "or", an assumption which the plaintiffs appeared to agree with. (I note that a class definition should never include "and/or" as it is almost always inherently ambiguous. At a minimum, I would have required that "and/or" be replaced with the appropriate conjunction.)

[206] I agree with the defendants that the proposed class definition is overbroad by effectively using the conjunction "or" and thereby including persons who purchased but never used JUUL products and persons who used but never purchased JUUL products. As a matter of common sense, with the exception of underage users, anyone who used JUUL products with any regularity would also have purchased JUUL products with regularity. However, the class definition must also take into account underage users. There is ample evidence of the usage of JUUL products by

young people who, at times, were prohibited from directly purchasing ENDS from retailers. These underage users would likely have had others purchase JUUL products for them. Although unique common issues will arise with respect to these users, such as the legality of the purchase contracts, they should not be eliminated from the putative class. To address such users, the class definition should specifically include persons who indirectly purchased JUUL products. Possible wording for the class definition is "All persons resident in Canada, except for the Excluded Persons, who used and directly or indirectly purchased JUUL Products…".

[207] The balance of the defendants' submissions, for the most part, conflate issues of class definition with issues relating to creation of subclasses, preferable procedure and individual issue assessment under ss. 27-28 of the *CPA*. Their submissions are similar to those made by the defendants in *Jiang,* which concerned a class action alleging breaches of the *BPCPA* by financial institutions in relation to prepaid cards. The certification judge determined that two or more persons met the proposed class definition, but then determined the definition was defective because of difficulties establishing objectively whether a person was a "consumer" within the meaning of the *BPCPA*. On appeal, Bauman C.J. held the judge erred by conflating the identifiable class requirement with considerations properly considered in the administration phase of class proceedings, such as the managing of individual issues.

> [100] The judge concluded that it was not possible to define the class with reference to objective criteria that establish at the outset of the litigation whether a person is a consumer under the *BPCPA* (at para. 117). This is problematic because the judge, on the contrary, began his analysis by saying that there is evidence that there exists two or more persons who meet the class definition. As I have said, the class members will certainly be able to determine at the outset of the litigation whether they meet the objective criteria making up the class definition. They can self-identify. What the judge is really saying is that the defendants may not at the outset of the litigation be able to identify all potential class members. What the judge is really saying is that whether a particular individual may, as a matter of fact, be found to be within the class definition may require further inquiry in the administration phase of this class proceeding. But that in no way detracts from the fact that this class definition establishes objective criteria by which membership in the class may be determined. Nothing I said in *Watson v. Bank of America Corporation*, 2014 BCSC 532 at para. 63, cited by the chambers judge at para. 116, should be taken as gainsaying this observation. [Emphasis added.]

> …
>
> [112] Moreover, I agree that Justice Masuhara has adopted the correct approach: the defendants' concerns here lie to be resolved not at the stage of s. 4(1)(b) but rather post-certification under ss. 12, 27 and 28 of the *CPA* in the event that Ms. Jiang's action meets the other certification requirements. As I will now explain, those sections provide a wealth of judicial tools to address individual issues in a timely and practical manner and, importantly, in ways that promote the objectives of access to justice, judicial economy and behaviour modification that, at bottom, are what the *CPA* is all about encouraging (*Dutton* at paras. 27-29).
>
> …
>
> [118] The point from *ALS* and *Lundy* is clear. In the individual issues stage the court enjoys access to many tools designed to assist in the timely and proportionate resolution of any issues. This is a critical advantage to the class proceeding and it is by the imaginative use of these tools that the objectives of the class proceeding regime – access to justice, judicial economy and behaviour modification – will be realized.
>
> [119] More to the point, Chief Justice Strathy's and Justice Perell's discussions are relevant to whether a class action is the preferable procedure, not whether there is an identifiable class.
>
> [120] In sum, on the s. 4(1)(b) requirement, I conclude that the judge erred in law by conflating the identifiable class requirement with the consideration of managing individual issues that should be addressed under s. 4(1)(d) of the *CPA*, with a keen eye to the broad power under the *CPA* to effectively manage these issues. This is an error in principle that merits appellate intervention.
>
> [Emphasis added.]

[208] To illustrate how the defendants conflate issues of class definition with individual issues, I will address some of the specific objections.

[209] The defendants say the class definition is overbroad because it includes persons who smoked cigarettes or used other nicotine products, persons who were aware of the risks, and persons who minimally used JUUL products. The simple answer to these submissions is that they raise individual or administrative issues. All of these subgroups contain two or more persons who may have claims against the defendants under one or more of the pleaded causes of action. For example:

a) Persons who smoked cigarettes or used other nicotine products are situated differently from those who used only JUUL products, but they still have potential claims against the defendants under consumer protection legislation,

for breach of contract, or for breaches of the *Competition Act*, which will likely require the creation of a separate sub-class;

b) Persons who used JUUL products but were aware of the risks cannot be excised from the class definition at this stage because the risks have yet to be determined. In any event, like cigarette smokers, such persons may still have a claim under consumer protection legislation, for breach of contract, or for breaches of the *Competition Act*; and

c) Persons who minimally used JUUL products may not have suffered a personal injury and may not have a claim in negligence, but they may have a claim under the *BPCPA* or the *Competition Act*.

[210] I have been referred by the defendants to *Harrison v. Afexa Life Sciences Inc.*, 2016 BCSC 2123, aff'd 2018 BCCA 165 [*Harrison*] in support of their submissions that the class definition is overly broad. *Harrison* concerned a class action on behalf of persons who purchased "Cold-Fx" between 2002 and 2012. At the certification hearing, in relation to the s.4(1)(b) requirement, Justice Dillon held that the proposed class was overbroad. At paras. 55-59, she wrote:

> [55] The proposed class here includes "all persons resident in British Columbia who purchased Cold-Fx … between March 9, 2002 to present". The essential complaint is that the defendants misrepresented that Cold-Fx provides short term relief of cold and flu symptoms. However, neither Harrison nor anybody else who has been identified has said why they purchased the product, whether they had read or were aware of the representations, or whether they thought that the product worked for the stated purpose or not. In this circumstance, there is no evidential link between any member of the proposed class and a complaint based upon the alleged misrepresentations.
>
> [56] The evidence that others had told counsel that they were interested in the class proceeding and that they had purchased Cold-Fx during the relevant time does not go so far as to establish that such persons have a complaint that they intend to pursue. The fact that such persons may have contacted counsel does not establish that there is a common complaint that these persons desire to be determined through the class action process.
>
> [57] The class definition is overly broad. It includes persons with no claims because some of the Cold-Fx products sold during the relevant time did not contain any of the misrepresentations, not all of the purchasers would have purchased the product for short term relief, not all of the persons would have

> purchased the product because of the representations, and not all of the purchasers were dissatisfied with the product.
>
> [58] The plaintiff has also failed to provide a means other than subjective examination to determine whether an individual purchaser falls within the class. The evidence shows that there are many reasons for a person to purchase this product. There does not appear to be an objective process to identify persons who purchased the product because of the representations. Nobody has come forward in the four years that this action has been progressing to say that the representations induced them to purchase the product, despite plaintiff counsel's publication of the action.
>
> [59] The plaintiff has failed to provide some basis in fact that any person purchased Cold-Fx based upon the alleged misrepresentations. Not a single person has self-identified as someone who relied upon the representations as alleged, and the plaintiff has not proposed a realistic methodology to objectively identify members of the proposed class. There is no evidence that anyone seeks to have a common complaint determined through the class action process.

[211] On appeal, Groberman J. observed that the claim concerned representations on packages made by the defendant but the evidence showed "that members of the class would not have been exposed to a common set of representations" (para. 33), and the wording of the representations varied by product and over time (para. 34). He also noted "there was no evidence that any consumer had purchased the product as a result of a misrepresentation" (para. 37) and "no attempt by the plaintiff to tailor the class to those who had relied on misrepresentations in purchasing the product, despite that being the central thrust of the claim" (para. 38). At para. 42 he concluded:

> [42] As I have indicated, I agree with the plaintiff's contention that the requirements of s. 4(1)(b) of the *Class Proceedings Act* may be met without showing that more than one individual is motivated to pursue a claim. As I read the chambers judge's reasons, however, her primary reason for finding that the requirements of s. 4(1)(b) were not satisfied was that there was an insufficient relationship between the class, as defined, and the claim being advanced. I am of the view that she made no error in that finding.

[212] The defendants say this case is similar to *Harrison* and that the class definition does not meet the requirements of s. 4(1)(b) for the same reasons. I disagree. First, this case is much broader than *Harrison*. This case concerns more than the representations allegedly made by the defendants. Here, the central allegation is that JUUL products are harmful and caused damages to the plaintiffs. In

Harrison, there was no such allegation or a claim for manufacturing, distributing and selling a dangerous product. Second, there is evidence that the representations allegedly made by the defendants were relied on. The affidavit of Mann-Campbell directly deposes to having seen JUUL advertisements and social media posts. He deposes to seeing ads with representations that*, inter alia*, JUUL products were "totally safe" and smokers should "make the switch". He deposes to relying on advertisements and representations. Mr. Osborn also deposes to seeing several JUUL advertisements and that they led him to believe JUUL products "were safe and healthy and did not pose any serious risk" to his health. He deposes to seeing ads with the same representations as deposed to by Mr. Mann-Campbell.

[213] The JUUL defendants submit that the class definition ought to contain a meaningful threshold of consumption because "[s]omeone who tries JUUL products only once or a few times is manifestly not addicted to them and has suffered no compensable harm". They refer me to *Létourneau c. JTI-MacDonald Corp*., 2015 QCCS 2382 [*Létourneau*], an amalgam of two class actions against cigarette companies, where the class definitions contained thresholds. In one, each class member was required to have smoked a minimum of 36,500 cigarettes. In the other, the class members were required to have smoked on a daily basis.

[214] I do not consider *Létourneau* helpful. Although the class definitions in *Létourneau* contained thresholds, the case did not address the question of whether it was necessary for the class definition to contain a threshold requirement.

[215] In the absence of an authority stating that there must be a threshold, I am not inclined to require that any such threshold be imposed. First, the creation of a threshold at this stage would be completely arbitrary and would involve an impermissible detour into the merits of the class action. Second, a threshold is arguably unnecessary for some of the claims advanced. For example, it is not apparent that a threshold is required for the claims made under the *BPCPA*.

[216] The JUUL defendants finally submit that persons who visited the online store of JUUL.ca cannot be included in the class as they agreed to arbitrate claims in

Ontario and to not bring claims in a class action proceeding. This submission presumes the arbitration and waiver clauses are valid and binding. However, in *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198 at paras. 248-250, the Court of Appeal held that a class action waiver clause is unenforceable as being contrary to public policy. Moreover, insofar as the defendants rely on the arbitration clause, the validity of such a clause is questionable given the decision in *Uber Technologies Inc. v. Heller*, 2020 SCC 16. In any event, the enforceability of the arbitration and class action waiver clauses can be addressed by creation of a subclass or, perhaps as an individual issue.

[217] I now address the submission of the Altria defendants that the plaintiffs have not met the s.4(1)(b) requirement because they have not established a basis in fact that anyone purchased JUUL products in Canada and suffered damages as a result of anything that Altria did or in reliance on any representations that Altria made. This submission is without merit for the reasons I gave in the jurisdiction application. In my reasons, I found that there was some evidence of a close relationship between Altria and JLI that supported the allegations of agency, joint venture, and conspiracy. I also addressed and rejected Altria's submissions that it did nothing in British Columbia or Canada in relation to the distribution, marketing and sale of JUUL products. At para. 96, I wrote:

> [96] Altria submits it did nothing in British Columbia with respect to the distribution, marketing and sale of JUUL products. I agree that there is an absence of positive evidence indicating that Altria had a direct involvement with the actual sale of JUUL products in Canada. However, the evidence of Mr. Surgner and Ms. Longest does not rule out the possibility that Altria had some involvement, direct or indirect, with the distribution, marketing or sale of JUUL products in Canada or British Columbia. As indicated, neither of them had any personal knowledge of JLC or the Canadian market for JUUL products. Moreover, their evidence does not rule out the possibility of a conspiracy or a collaborative joint venture.

[218] The Court of Appeal addressed my findings at paras. 47-48, as follows:

> [47] The judge's analysis focussed on the pleaded tort of conspiracy. It was, and is, common ground that a conspiracy occurs in British Columbia if the harm is suffered here, regardless of where the wrongful conduct occurs: Imperial Tobacco at para. 41; Fairhurst at para. 45; Ewert at para. 77. In other words, Altria's insistence that it did not directly distribute, market,

> advertise, or sell JUUL product in British Columbia was not an answer to the conspiracy claim. This was particularly so in light of evidence of the cross-border effects of advertising and marketing activities in the United States. The judge found that the evidence on the application indicated a relationship between Altria and JUUL USA that goes "beyond that of a mere shareholder to a company": at para. 81. In support of that characterization, the judge cited evidence that included the services Altria provided to JUUL USA under the Services Agreement, and the confidential pre-Transaction discussions that took place over many months between high-level executives from Altria and JUUL USA. The judge noted, accurately, that no one involved in those discussions had provided affidavit evidence on the application. He also noted Mr. Surgner's evidence that Altria stood to benefit financially from JUUL's success in Canada.
>
> [48] On the basis of the evidentiary record as a whole, the judge concluded, at the first stage of the Ewert framework, that Altria's evidence did not demonstrate that it did not engage in activities that were related to the advertising or marketing of JUUL products in British Columbia. In reaching this conclusion, the judge did not ignore or misconceive evidence that was material to his analysis. He was clearly alive to, and referenced at length, Altria's evidence of its lack of physical presence in British Columbia. He was simply not persuaded that the evidence was sufficient to undermine the good arguable case for jurisdiction that the respondents had put forward. I am not persuaded that Altria has shown any palpable and overriding error in relation to the judge's impugned findings. [Emphasis added.]

[219] The evidence on this certification application is substantially the same as the evidence that was before me on the jurisdiction application. Put simply, I am satisfied that there is a basis in fact supporting s. 4(1)(b) of the *CPA*.

[220] I wish to address the case of *Caputo v. Imperial Tobacco Ltd*., 2004 CanLII 24753 [*Caputo*], a decision of Justice Winkler of the Ontario Superior Court of Justice. This authority was referred to me by the defendants. *Caputo* concerned certification of a class action against various tobacco companies. The proposed class was "residents of Ontario, whether living or deceased, who have ever smoked cigarette products manufactured, marketed, or sold by the defendants". Justice Winkler noted, at para. 42, that various alternative class definitions had been proffered by the plaintiff but all failed because they resulted in arbitrary exclusions.

> [42] In this case, it is clear that the plaintiffs are having difficulty in reaching any definition that meets with even their own approval let alone the approval of the court. Further, none of the solutions proffered by the plaintiffs to create an acceptable definition could achieve that result without resort to arbitrary exclusions that *Hollick* holds are improper. As an example, one

> suggestion the plaintiffs made was to drop the *FLA* claimants. Another was to drop the estate claims. Still another is to limit the class to only current residents. Yet another is to redefine the class in terms of purchasers as opposed to smokers. [Emphasis added.]

[221] At para. 45, Winkler J. concluded that the plaintiffs' inability to proffer an acceptable definition was because none existed.

> [45] In my view, the present action is an amalgam of potential class proceedings that make it impossible to describe a single class sharing substantial "common issues", the resolution of which will significantly advance the claim of each class member, which is the test to be applied according to *Hollick*. Moreover, this is not a case where the creation of subclasses will address the primary class definition deficiency. Subclasses are properly certified where there are both common issues for the class members as a whole and other issues that are common to some but not all of the class members. This is not the case here. Rather, the plaintiffs have melded a number of potential classes into a single proceeding. The result is an ambitious action that vastly overreaches and which, consequently, is void of the essential element of commonality necessary to obtain certification as a class proceeding. Simply put, the reason that no acceptable class definition has been posited is that no such definition exists.

[222] Surprisingly, at para. 42, Winkler J. noted that various proposed definitions had been proffered but failed because they resulted in arbitrary exclusions.

> [42] In this case, it is clear that the plaintiffs are having difficulty in reaching any definition that meets with even their own approval let alone the approval of the court. Further, none of the solutions proffered by the plaintiffs to create an acceptable definition could achieve that result without resort to arbitrary exclusions that *Hollick* holds are improper. As an example, one suggestion the plaintiffs made was to drop the *FLA* claimants. Another was to drop the estate claims. Still another is to limit the class to only current residents. Yet another is to redefine the class in terms of purchasers as opposed to smokers. [Emphasis added.]

[223] Respectfully, I disagree with Winkler J. Where a class definition cannot be narrowed without arbitrarily excluding valid claims, the solution is not to deny certification but to allow certification and to address the differences between groups using subclasses or as individual issues. Such an approach is more consistent, in my view, with that approved of by the Court of Appeal in *Jiang.*

[224] There are other minor problems with the class definition in addition to those already identified. Thse are:

a) First, the definition refers to “JUUL products” which is vague and ambiguous. The specific products ought to better described, by referencing the brand names “JUUL device” and “JUUL pods”;

b) Second, in my view, the phrase “in Canada” should precede the phrase “for purposes that were primarily personal, family, or household”; and

c) Finally, it is unnecessary in the circumstances to use the words “for purposes that were primarily personal, family, or household”. I appreciate that in choosing these words, the plaintiffs are likely following authority that has suggested the words of the statute be tracked. However, given that this class action concerns a product that is only for personal use, the words “family or household” serve no purpose.

[225] I therefore direct that the plaintiffs are to amend the class definition in the FANOCC to address the various issues that have been identified.

Section 4(1)(c) – Common Issues

Legal Principles

[226] Section 4(1)(c) of the *CPA* requires that the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members. The term “common issues” is defined in s. 1 of the *CPA* as including issues of fact and law.

> **"common issues"** means
>
> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[227] In *Pro-Sys*, at para. 108, Rothstein J. set out some of the key considerations that apply in assessing commonality.

> [108] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that “[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis” (para. 39).

> I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:
>
> (a) The commonality question should be approached purposively.
>
> (b) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (c) It is not essential that the class members be identically situated vis-à-vis the opposing party.
>
> (d) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (e) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[228] The "common success" requirement was further addressed in *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 105, as follows:

> [105] In *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, this Court clarified that the "common success" requirement in *Dutton* should be applied flexibly. "Common success" denotes not that success for one class member must mean success for all, but rather that success for one class member must not mean *failure* for another (para. 45). A question is considered "common", then, "if it can serve to advance the resolution of every class member's claim", even if the answer to the question, while positive, will vary among those members (para. 46).

[229] Justice Iyer (as she then was) succinctly described the common issues requirement in *Capital One*, at para. 152:

> [152] This statutory requirement requires the plaintiff to show some basis in fact that each proposed common issue actually exists and can be answered in common across the class. A common issue exists if its resolution will avoid duplicative fact-finding or legal analysis, it is a substantial component of each class member's claim that must be resolved to resolve the claim, and success for one class member means success for all, although not necessarily to the same extent: *Finkel* at paras. 22-23. This highlights that the focus of the inquiry, including the assessment of the evidence, again is on the form of the proceeding, not on the merits of the claim.

[230] Commonality requires that the plaintiffs establish some sort of methodology for proving there is harm on a class-wide basis. This requirement was discussed in *Miller v. Merck Frosst Canada Ltd.,* 2015 BCCA 353 at paras. 33-34 [*Miller*], where it

was held that the plaintiffs merely needed to show a plausible way causation could be established.

> [33] In my opinion, however, "methodology" in this context is not, and should not be, confused with a prescribed scientific or economic methodology. Instead, it refers to whether there is any plausible way in which the plaintiff can legally establish the general causation issue embedded in his or her claim. As noted in Andriuk, not every case will require expert evidence (para. 11).
>
> [34] The methodology requirement must also be considered in light of the policy objectives of class actions: the object is to promote fair and efficient resolution of the common issues. If there is no way that the common issues could realistically be established in a class action proceeding, then these goals would not be achieved and a class action should not be certified. It is that concept which underpins the methodology requirement described in Microsoft.

One Step or Two?

[231] The parties disagree on the proper approach to commonality. The plaintiff submits that the test is one-step, namely, whether there is some evidence that the proposed common issues can be answered on a class-wide basis. The defendants, on the other hand, submit that the test is in two parts, namely, that the plaintiffs must establish some basis in fact that: (1) the common issue actually exists; and (2) the issue can be answered in common across the class.

[232] The defendants have referred me to several authorities in support of their submission that a two-step analysis is required including *Bhangu v. Honda Canada Inc.*, 2021 BCSC 794, at para. 99, and *Jensen v. Samsung Electronics Co. Ltd.*, 2023 FCA 89, at paras. 79-80.

[233] The plaintiffs have referred me to *Trotman v. WestJet Airlines Ltd*., 2022 BCCA 22 [*Trotman*], *Nissan,* and *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127 [*Bosco*].

[234] In *Trotman,* at para. 57, Bauman C.J. wrote:

> [57] The certification judge is not to conduct an adjudication on the merits. There need only be some basis in fact for the proposition that the issue can be determined on a class-wide basis: see *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 99 [*Pro-Sys*], citing *Hollick v.*

> *Toronto (City)*, 2001 SCC 68 at para. 25. The evidence at this stage "goes only to establishing whether these questions are common to all the class members": *Pro-Sys* at para. 110. Said another way: "is there some evidence of class-wide commonality, that is some evidence that the proposed common issue can be answered on a class-wide basis": *Grossman v. Nissan Canada*, 2019 ONSC 6180.

[235] In *Nissan,* Griffin J. considered and rejected the two-step approach.

> [124] On appeal, Nissan submits that the judge erred in finding that Mr. Mueller had shown some basis in fact that the claims of the class members raise common issues, pursuant to s. 4(1)(c) of the CPA.
>
> [125] Nissan argues that there are two steps to the "some basis in fact" test under the "common issues" requirement: the plaintiff must show (1) some basis in fact that the common issue actually exists, and (2) some basis in fact that the issue is common for the entire class.
>
> …
>
> [132] I do not agree with Nissan that the test as to whether there is evidentiary support for a common issue in a claim of alleged dangerous product liability requires two distinct categories of evidence: some evidence that there is a common defect; and some evidence that the alleged defect is dangerous.
>
> [133] In analyzing whether there is some basis in fact for a common issue, the court must consider the language of the common issue that is proposed, and whether there is some evidence that supports the argument that it is a common issue across members of the class.

[236] Most recently in *Bosco* at para. 33, which did not directly involve certification, Justice Horsman. said:

> … Thus, for example regarding the commonality requirement, the plaintiff must show some basis in fact that the issues are common to all class members, not some basis in fact that the acts alleged actually occurred: *Pro-Sys* at para. 110.

[237] In view of these authorities, particularly *Nissan*, I prefer to address commonality as a single question, namely, is there some basis in fact, or some evidence, that the proposed issues are common across members of the class or, as Bauman C.J. put it, is there some evidence that the proposed common issue can be answered on a class-wide basis.

[238] I additionally question whether the application of the one-step or two-step approach can have any practical effect on the result. This is an opinion also

expressed by several of my colleagues: *O'Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371 at para. 263 [*O'Connor*]; *Bowman v. Kimberly-Clark Corporation*, 2023 BCSC 1495 at para. 135; and *Barroqueiro v. Qualcomm Incorporated*, 2023 BCSC 1662 at para. 210.

Discussion

[239] The plaintiffs have provided a list of amended proposed common issues comprising 38 common issues. The plaintiffs say the issues are common to class members and that there is some basis in fact for each. The JUUL defendants, on the other hand, submit:

a) There is no basis in fact for many of the plaintiff's proposed common issues such as the alleged representations and omissions, including the "vaporized" campaign, which was years before JUUL products were introduced in Canada; and

b) The proposed issues lack commonality. The class is so broad that none of the proposed issues is common to all class members. They say, for example, that questions of representations and omissions made are not relevant to class members who used but did not purchase JUUL products (CI #7) and questions of whether JUUL products are dangerous are not relevant to class members who purchased but did not use JUUL products (CI #18).

[240] I observe that narrowing the class definition to persons who used and purchased JUUL products, as I have directed, removes some of the commonality issues addressed by JUUL.

Jurisdictional Facts

[241] The Altria defendants make many of the same submissions as the JUUL defendants but raise unique issues concerning the common issues and jurisdiction. In particular, Altria submits that "there can be no common question certified against [it] in the absence of the Plaintiffs … establishing a real and substantial connection between Altria and each of the causes of action". Altria says this is so because the

standard of proof on the jurisdiction application was “good arguable case” whereas the standard of proof on this certification application is “some basis in fact”. I disagree. In my view, the standards of proof are not so different that the jurisdictional issues should be revisited.

Factual Issues

[242] The proposed common issues are divided into categories by the plaintiffs. Issues 1-8 are said to be factual questions. These are further subdivided by the plaintiff into issues relating to JUUL products and issues relating to the conduct of the defendants.

[243] Proposed common issues 1-4 are:

> 1. Do JUUL e-cigarette devices … contain nicotine and other chemicals including benzoic acid, propylene glycol, glycerine, carbonyl compounds, aldehydes, and/or flavouring agents?
>
> a. Are any or all of the above dangerous and/or harmful chemicals when inhaled in the intended manner?
>
> 2. Are JUUL Products addictive?
>
> 3. Are individuals 26 years of age and younger (“Youth”) more sensitive and vulnerable to the effects of nicotine, including at a higher risk of becoming addicted to nicotine, as a result of ongoing brain and neurological development?
>
> 4. Do JUUL Products have the capacity to cause nicotine addiction, nicotine poisoning, respiratory injury (asthma, pneumonia, COPD, bronchiolitis obliterans, lung failure/collapse), seizure and stroke?

[244] I have little hesitation in finding that there is some evidence that common issues 1, 2 and 4 can be answered on a class-wide basis. These are factual questions that go to the root of the various claims made in the notice of civil claim and there is clearly “some” evidence supporting each of them. Dr. Katz has deposed to the chemical composition of JUUL products and has opined to the dangers of using JUUL products and the injuries that can result. Dr. Proschaska also extensively opines on the addictive nature of JUUL products. Their opinions provide a plausible way in which the plaintiffs can establish general causation.

[245] Proposed common issue 3 essentially asks: Are young people (age 26 and younger) more sensitive and vulnerable to nicotine exposure and at higher risk of suffering harm? This issue is also addressed by Dr. Katz and Dr. Proschaska, who provide details of the nature and mechanism of enhanced youth vulnerability. I note that this issue is not relevant to class members older than 26, however, this does not mean the issue is not common. If this question is answered positively, meaning success for persons 26 years of age and younger, it does not mean the other class members fail. The answer to this question is simply not relevant to those class members older than 26.

[246] Proposed common issues 5-8 relate to the conduct of the defendants. They are:

> 5. Did the Defendants, or any of them, sell JUUL Products in the Canadian market during the Class Period?
>
> 6. Did the Defendants, or any of them, develop and implement a media campaign for the purpose of marketing JUUL Products?
>
> a. Was the media campaign targeted at Youth?
>
> b. Was the media campaign targeted at non-smokers?
>
> c. Did the media campaign result in an increase in nicotine use by Youth?
>
> d. Did the media campaign result in an increase in nicotine addiction among youth?
>
> 7. Did the Defendants, or any of them, make some or all of the representations or omissions, as alleged at paragraphs 73 and 116 of the Fourth Amended Notice of Civil Claim (the “Representations and Omissions”)?
>
> 8. Did the Defendants, or any of them, fail to inform the Plaintiffs and the Class Members of the Omissions?

[247] Concerning common issue 5, JLI and Altria submit that there is no evidence that either of them sold e-cigarettes in Canada and, therefore, this common issue cannot be certified as against them. I agree. There is no evidence that these entities actually sold JUUL products either directly or through middlemen. Therefore, at a minimum, common issue 5 needs to be reworded to reference only JLC.

[248] Altria makes the same submission in reference to common issues 6-8, namely, that it did not make any of the alleged representations or omissions. However, that is something for the trial judge to determine. I am satisfied that there is some evidence of the representations and omissions and that there is some evidence Altria had some involvement with the affairs of JLC, as was addressed in the jurisdiction application. In my view, that is sufficient to certify these common issues as written.

[249] The defendants more generally submit that there were different marketing campaigns over time which affected different individuals in different ways and that, accordingly, there can be no commonality. Relatedly, they further say the plaintiffs have not proposed a methodology to address these different campaigns and how they affected the class members on a class-wide basis. I reject these submissions. The evidence of Max Valiquette addresses in detail the marketing activities undertaken with respect to JUUL products and opines that it was directed towards young people. Dr. Prochaska provides a similar opinion. The marketing and promotional literature that is in evidence either directly supports that the various representations and omissions were made or could give rise to an inference that they were made or omitted. Additionally, [redacted] and the defendants' internal communications provide some evidence of these issues. Ultimately, it will be up to the trial judge to determine what representations and omissions were made, when and their effect on the class members.

Breach of Contract/SGA

[250] Proposed common issues 9-12 relate to the claims for breach of contract and breaches of the *SGA*. They are:

> 9. Did the Defendants have an unwritten contract with Class Members that the JUUL Products would be of merchantable quality and fit for use?
>
> 10. Were JUUL Products sold and distributed by the Defendants not of merchantable quality and/or unfit for its intended use on the basis that they contained undisclosed levels of nicotine which were abnormally high and abnormally potent and contained other harmful chemicals that had not been approved for use via inhalation and may cause physical injury when used as intended?

> 11. Did the Defendants breach their contract with Class Members?
>
> 12. Are Class Members entitled to a claim for recovery against the Defendants under the Sale of Goods Legislation for breach of the implied condition that the goods are of merchantable quality and the implied warranty or condition as to the quality or fitness of the JUUL Products for their intended use?

[251] I have determined that, because of ambiguities in the FANOCC, the plaintiffs have not properly pleaded a cause of action against the defendants for breach of contract and breaches of the *SGA*. Hence, these questions cannot be certified at this time.

[252] Additionally, the evidence before me is that most sales to consumers were through third-party retailers and only JLC sold JUUL products direct to consumers. There is no evidence and no basis in fact that JLI or Altria entered into any contracts with putative class members. In these circumstances, the common issues related to breach of contract and breaches of the *SGA* could only be certified if limited to JLC.

Consumer Protection Legislation

[253] Common issues 13-16 relate to breaches of consumer protection legislation. They are:

> 13. Does the Consumer Protection Legislation apply to the Defendants?
>
> 14. Does the Consumer Protection Legislation apply to the claims of the Plaintiffs and Class Members?
>
> 15. Did the Defendants' marketing and/or sale of JUUL Products, including the Representations and Omissions, constitute "deceptive acts or practices" and/or unconscionable acts or practices", within the meaning of the Consumer Protection Legislation?
>
> 16. If the answer to Q. 15 is yes:
>
> (a) Are the Plaintiffs and Class Members entitled to damages under the applicable Consumer Protection Legislation?
>
> (b) Are the Defendants or any of them, required to restore the money or other property or thing the Defendants, or any of them, acquired under the applicable Consumer Protection Legislation?

[254] The JUUL defendants submit that these issues are phrased "in hopelessly vague and broad terms". They note that a variety of representations are alleged to

have been made at different time periods. They say there is no commonality and the individual issues will far outweigh the common issues. They also note that the questions do not address specific legislation or differences in legislation.

[255] Altria submits there is no basis in fact that it was ever a “supplier” or made any of the impugned representations and omissions which are alleged to constitute deceptive or unconscionable acts or practices.

[256] I agree with some but not all of the submissions of the defendants.

[257] I have already rejected the submission that there is a lack of commonality because there were different marketing campaigns over time.

[258] I also disagree with the defendants that individual issues outweigh common issues. Sub-classes can be created, if necessary, to address the different marketing campaigns.

[259] However, I agree that the issues as posed cannot be certified because they do not take into account the different jurisdictions, the particular legislation in those jurisdictions and the remedies provided in the particular legislation. They must be broken down by jurisdiction and legislation. Examples of how such common issues ought to be framed, are contained in *Capital One* at para. 158, and *WN Pharmaceuticals,* at paras. 55-56.

[260] I also agree that the common issues as posed are overly vague. The issue should specifically list the representation or omission that is alleged to constitute the unconscionable or deceptive practice. It should not use “and/or” nor should it use the word “including”. The representations and omissions must be set out so that commonality can be assessed. I appreciate that the term “Representations and Omissions”, is a defined term in the pleading, but this does not save the questions as posed.

[261] Additionally, I question the wording of common issue 15, which suffers from two defects. First, it refers to marketing and/or sale; however, as I have indicated,

there is no evidence that any of the defendants except JLC, actually sold, and therefore supplied, products directly to consumers. The basis of the claims against the JLI and Altria must be in relation to sub-paragraph (b) of the definition of "supplier" in the *BPCPA*, namely that they solicited, offered, advertised or promoted the products. These differences should be reflected in the issues. Second, common issue 15 appears to incorporate the definition of Representations and Omissions as contained in the FANOCC. In my view, the common issues should expressly and specifically set out what is alleged to constitute the deceptive or unconscionable acts or practices. I would add that the "Representations and Omissions" in the FANOCC are repetitive and could easily be pared down.

[262] Accordingly, these issues cannot be certified as written.

Negligence/Failure to Warn

[263] Common issues 17-20 relate to the claim in negligence. They are:

> 17. Did the Defendants, or any of them, breach the standard of care with respect to the design, development, manufacturing, testing, labelling, marketing, distribution and/or sale of their JUUL Products? If so, when and how?
>
> 18. Did the Defendants, or any of them, breach the applicable standard of care in designing inherently dangerous products? If so, when and how?
>
> 19. Are JUUL Products defective or unfit for the purpose for which they were designed, developed , tested , labelled , marketed , distributed, sold, and/or otherwise placed in the stream of commerce in Canada by the Defendants or any of them?
>
> 20. If one or more of the common issues (17) to (19) are answered affirmatively, did the Defendants, or any of them, breach a duty to warn?

[264] The defendants made minimal submissions on these common issues, other than suggesting that individual issues will predominate over any common issues. I do not agree. Properly framed common issues in relation to negligence and failure to warn will avoid duplicative fact-finding and legal analysis and can be a substantial component of each class member's claim. However, I find the common issues as posed problematic.

[265] In assessing these questions, I remind myself of what is required to prove a claim in negligence. As addressed above, to make out a claim in negligence, a plaintiff must plead and prove that the defendant owed a duty of care, failed to meet the requisite standard of care and that the plaintiff suffered injury as a consequence. In the context of a product liability claim, a plaintiff must plead and prove a duty to warn of the product's dangerous qualities and a corresponding failure to warn. The plaintiffs have not addressed all of these requisite elements in the common issues. Common issue 18 addresses the breach of the standard of care, namely by "designing inherently dangerous products" but the other elements are not addressed. Common issue 19 addresses fitness for purpose, an issue for an *SGA* claim but not necessarily for a claim in negligence. Significantly, the common issues do not address whether the defendants owed a duty of care to purchasers and users of JUUL products and they have not addressed the requisite standard of care, presumably to manufacture and distribute a product that is safe for human use or to provide appropriate warnings of the dangers the product poses.

[266] As written, common issues 17-20 cannot be certified and must be amended.

Competition Act

[267] Common issue 21 relates to the *Competition Act* claim and asks:

> 21. Did the Defendants, or any of them, engage in conduct which is contrary to section 52 of the Competition Act (which is contained in Part VI of the Competition Act), giving rise to liability pursuant to section 36 of the Competition Act?

[268] The defendants' submissions in relation to the *Competition Act* common issue were again minimal. They argue that there is a lack of commonality because of the different promotional and marketing campaigns which varied over time and by location. I have rejected this submission in other contexts. There is sufficient commonality.

[269] I have some concerns about the wording of this common issue in that it does not specify the conduct that is alleged to infringe the *Competition Act*. However, the

defendants did not raise this as an issue and a similarly worded common issue was certified in *WN Pharmaceuticals* (see para. 53).

Civil Conspiracy

[270] Common issues 22-27 relate to the conspiracy claim. They are:

> 22. Did the Defendants, or any of them, conspire to harm the Class Members?
>
> 23. Did the Defendants, or any of them, act in furtherance of the conspiracy?
>
> 24. Was the predominant purpose of the conspiracy to harm the Class Members?
>
> 25. Did the conspiracy involve unlawful acts?
>
> 26. Did the Defendants, or any of them, know or ought to have known, that the conspiracy would likely cause injury to the Plaintiffs and Class Members?
>
> 27. Did the Plaintiffs and Class Members suffer loss or damages as a result?

[271] The plaintiffs largely rely upon my determinations in the jurisdiction motion as supporting some basis in fact for the conspiracy common issues.

[272] The JUUL defendants make two submissions:

a) There is no allegation that the plaintiffs suffered damage as a result of the alleged conspiratorial conduct that is distinguishable from the damages suffered as a result of an alleged breach of statute, and as a consequence, the allegation of “unlawful act” conspiracy is defective; and

b) The plaintiffs cannot establish a predominant purpose conspiracy, as there is no basis in fact for an assertion that the defendants’ intent was to inflict harm on the proposed class members.

[273] I reject both of these submissions. First, in para. 162 of the FANOCC under the heading “Civil Fraud and Conspiracy” the plaintiffs plead their “purchase and use of e-cigarettes resulted in losses and damages”. Second, at this stage, it would be rare for a plaintiff to be able to establish with any certainty that the intent of the

defendants was to inflict harm. The plaintiffs have, however, provided evidence of marketing campaigns targeted at youth, of increasing consumption of JUUL products by youth, of the addictive nature of JUUL products and of other harms caused by JUUL products. This is some evidence supporting an inference that the defendants must have intended the natural result of their alleged actions.

[274] Altria submits that there is no basis in fact for the conspiracy. It says there was no conspiracy and that a conspiracy to target youth made no sense, as it would be contrary to its own interest. It further says Altria is a completely separate company and had no involvement in the business of JLI or JLC, other than the provision of certain services exclusively to JLI.

[275] In my view, Altria's submissions are mostly a rehash of arguments made and rejected on the jurisdiction motion.

[276] On the jurisdiction motion, I determined that there was a good arguable case for jurisdiction against Altria. I found there was a close relationship between Altria and JLI that supported the allegations of agency, joint venture, and conspiracy and I found there was some evidence of a causal link between Altria's activities and British Columbia, including Mr. Valiquette's evidence of the cross-border effects of advertising. The new evidence submitted by Altria on this certification application, which I have outlined above, does not alter any of the determinations I made at the jurisdiction motion. It is essentially the same, but given by different individuals.

[277] The question before me is whether the plaintiffs have shown some basis in fact that each proposed common issue actually exists and can be answered in common across the class. This does not involve an analysis of the merits of the claim, which is essentially what Altria is asking me to do.

[278] In my view, the plaintiffs have shown some basis in fact for the common issues relating to conspiracy, all as addressed in my reasons on the jurisdiction motion.

[279] However, I again have concerns about the wording of the proposed common issues. Common issue 22 asks whether the defendants conspired to harm class members but common issue 24 then asks whether the predominant purpose of the conspiracy was to harm class members. I don't understand why there are two questions that are essentially the same. Further problems are:

a) Common issue 25 merely asks if the conspiracy involved unlawful acts without specifying the unlawful acts pleaded, namely breaches of consumer protection legislation or breaches of the *TVPA*; and

b) Common issue 26 asks whether the defendants knew or ought to have known, that the conspiracy would likely cause injury to the class members. This is a component of unlawful means conspiracy but not of a predominant purpose conspiracy.

[280] In my view, common issues 22-26 need to be reworded to address the legal requirements of the two types of conspiracy and to conform with the pleading, which, for unlawful means conspiracy, alleges only breaches of consumer protection legislation and the *TVPA*. Further, because the unlawful means conspiracy is, in part, for breaches of provincial consumer protection legislation, the issues must be broken down by jurisdiction and legislation.

[281] Accordingly, the conspiracy common issues cannot be certified as written. These issues must be amended.

Damages

[282] Common issues 28-30 relate to damages. They are:

> 28. Can the amount of damages be determined on an aggregate basis, and if so, what are the aggregate damages for the Class?
>
> 29. Was the conduct of the Defendants, or any of them, such that they ought to pay global, exemplary or punitive damages to the Class?
>
> 30. Should the Defendants, or any of them, pay the full costs, or any costs, of investigation in connection with this matter, including the cost of the proceeding or part thereof, pursuant to section 36 of the *Competition Act* and if so, in what amount?

[283] Common issue 28 relates to aggregate damages which are addressed in s. 29 of the *CPA*.

> 29 (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members,
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> (2) Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,
>
> (a) submissions that contest the merits or amount of an award under that subsection, and
>
> (b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

[284] Concerning common issue 28, the plaintiffs submit that all class members have a common claim for refunds, which can be assessed by reference to sales data, and a common claim for nominal damages for breach of contract. They further submit that non-pecuniary damages can be assessed on a class basis. They refer me to *Good v. Toronto (Police Services Board)*, 2016 ONCA 250, in support of the latter submission, where the Ontario Court of Appeal held that the availability of aggregate damages should be left to the common issues judge after liability is determined. The JUUL defendants submit that there is no meaningful common issue on damages, as such issues are necessarily individual. Altria additionally submits that the plaintiff has not proposed a methodology for the determination of causation and damages on a class-wide basis.

[285] I agree with the plaintiffs that there is some basis in fact for the aggregate determination of refunds and nominal damages for breach of contract. An appropriate methodology for the determination of such damages has been proposed, namely, based on the sales records of the defendants. However, I do not

agree that there is some basis in fact for aggregate non-pecuniary damages. Non-pecuniary damages are highly individualized, especially given the size and diversity of the proposed class. For example, a 40-year-old cigarette smoker who switched to JUUL is in a profoundly different position from a 15-year-old who never smoked traditional cigarettes.

[286] Common issue 29 relates to global exemplary or punitive damages. The defendants submit that there is no basis in fact they engaged in conduct attracting punitive damages and that the question is premature. I disagree. There is some evidence that the defendants were aware or became aware that young people were being introduced to nicotine through JUUL products for the first time and there is some evidence they may not have reacted appropriately or quickly enough to address this. It will be for the trial judge to determine if global exemplary or punitive damages are warranted.

[287] Concerning common issue 30, which deals with costs under s. 36 of the *Competition Act*, the defendants made no submissions on this issue.

[288] Accordingly, common issue 28 must be amended to stipulate that the aggregate assessment is only in respect of the monetary claim for refunds or restitution and nominal damages for breach of contract.

Restitutionary Claims

[289] Common issues 31-34 relate to the claim in restitution. They are:

> 31. Have the Defendants, or any of them, been unjustly enriched by the collections of monies paid by the Class for their purchases of JUUL Products?
>
> 32. Has the Class suffered a corresponding deprivation in their purchases of JUUL Products?
>
> 33. Is there a juristic reason why the Defendants, or any of them, should be entitled to retain the enrichment?
>
> 34. What restitution, if any, is payable by the Defendants, or any of them, to the Class based on unjust enrichment or other restitutionary remedies?

[290] The JUUL defendants submit these issues are not certifiable because not all class members purchased JUUL products and unjust enrichment is not a viable cause of action. However, I have determined that the class definition is to be amended to only include persons who both purchased and used JUUL products and I have determined that unjust enrichment is a viable cause of action.

[291] Altria submits that there is no basis in fact that it has been unjustly enriched because it sold its interest in JLI at a loss. This submission is without merit, as there could be many reasons why Altria's investment in JLI declined in value over time.

Provincial Health Insurer Recovery Issues

[292] Common issues 35-38 relate to the claims for recovery of health care costs. They are:

> 35. Are the Plaintiffs and Class Members "beneficiaries" who are entitled to recover from the Defendants, or any of them, for health care services provided by Provincial Health Insurers ("PHIs") as defined under the Equivalent Health Care Cost Recovery Statutes?
>
> 36. Did the Defendants' conduct constitute a "wrongful act or omission" within the meaning of the British Columbia *Health Care Costs Recovery Act*, SBC 2008, c 27, ss. 1-3 and 7 and *Health Care Costs Recovery Regulation*, BC Reg 397/2008, S 3. or any other Equivalent Healthcare Cost Recovery Legislation?
>
> 37. Did the Defendants' conduct have the capacity to cause or contribute, directly or indirectly, to injury to the Plaintiffs and Class Members which has resulted in past cost of health care services?
>
> 38. Is the Defendants' conduct reasonably expected to cause or contribute, directly or indirectly, to future cost of health care services to the Plaintiffs and Class Members?

[293] The JUUL defendants submit these issues cannot be certified because there is no basis in fact to believe that this Court could determine whether all proposed class members are entitled to recover health care costs on a common basis or that the Minister of Health (the "Ministry") could certify the costs of health care services provided to class members under s. 16(1)(b) of the *HCCRA.* The defendants refer me to *O'Connor*, a class action involving the 2021 Lytton wildfire, where Chief Justice Hinkson declined to certify a question relating to health care costs on the

basis that the plaintiffs had not proposed how such costs could be decided on a class-wide basis.

[294] The plaintiffs refer me to *MacKinnon* a class action by persons who purchased and used an oral contraceptive, where Horsman J., as she then was, certified common issues similar to those proposed by the plaintiffs.

[295] I note that s. 16(1)(b) of the *HCCRA* expressly provides for the Ministry to issue a certificate in respect of health care costs for "a class of beneficiaries". I further note that the Ministry of Health has, by letter dated March 22, 2023 confirmed that it has retained counsel to pursue its claims for recovery of health care costs and "expects to assist counsel to investigate the health care costs relating to persons who used JUUL e-cigarettes".

[296] In my view, s. 16(1)(b) of the *HCCRA* and the letter from the Ministry are some basis in fact for the recovery of health care costs on a class-wide basis. I do not agree that the plaintiffs must, at this time, provide some additional evidence that the Ministry can provide a certificate.

Section 4(1)(d) – Preferable Procedure

Legal Principles

[297] Section 4(1)(d) of the *CPA* requires that a class proceeding be the preferable procedure for the fair and efficient resolution of the common issues. Section 4(2) then sets out the factors the court must consider in determining whether a class proceeding is the preferable procedure.

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[298] In *Bodnar v. Community Savings Credit Union*, 2015 BCCA 504 at para. 51, Justice Bennett reminds us that these are not exhaustive factors and that the court must also consider the objectives of class proceedings, namely, access to justice, judicial efficiency, and behaviour modification.

> [51] This is not an exhaustive list of factors. In addition, the court must consider "judicial economy, access to justice, and behaviour modification." *Hollick v. Toronto (City)*, 2001 SCC 68 at para 27. These are merely factors, not conditions precedent which the plaintiff must prove will be fully achieved in a class proceeding. *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 22–23.

[299] There are essentially two questions in the analysis: first, whether a class action is a fair, efficient and manageable method of advancing the claims; and second, whether a class action is the preferable alternative to other available proceedings. These questions involve both substantive and procedural aspects, as explained by Dickson J. in *Finkel,* at paras. 25-26:

> [25] Two questions predominate in a preferability analysis: (a) whether a class proceeding would be a fair, efficient and manageable method of advancing the claims and (b) whether a class proceeding would be preferable compared with other realistically available means for their resolution, which may include court processes or non-judicial alternatives. As to the first question, the common issues must be considered in the context of the action as a whole and their relative importance taken into account when preferability is determined. As to the second, the impact of a class proceeding on class members, the defendants and the court must be considered and a practical cost-benefit approach applied: *AIC* at paras. 21, 23; *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 230; affirmed 2015 BCCA 252; leave to appeal dismissed [2015] S.C.C.A. No. 326 (S.C.C.).
>
> [26] In *AIC*, Justice Cromwell explained the analytical approach to the preferability issue from the access to justice perspective. In doing so, he noted that the preferable procedure requirement has interconnected substantive and procedural aspects. The substantive aspect is concerned with whether class members will receive a just and effective remedy if their

> claims are established; the procedural with whether they will have access to a fair process, bearing in mind the existence of economic and other possible barriers. As Chief Justice Strathy stated in *Fantl v. Transamerica Life Canada*, 2016 ONCA 633, *AIC* requires the court to consider the barriers to access to justice; the potential of a class action to address those barriers; and the alternatives to a class action, including the extent to which the alternatives address the relevant barriers and how the two proceedings compare: *AIC* at paras. 4, 24, 27, 37-38; *Fantl* at para. 27.

Discussion

[300] The plaintiffs submit: the common issues predominate over any individual issues; a class action is preferable as other means of resolving the issues would involve hundreds if not thousands of individual actions; a class action will further the goals of access to justice, judicial economy and behavioural modification; and there are no other national class actions with the same subject matter.

[301] The defendants submit a class action is not the preferable procedure because the common issues are elementary, their resolution will not significantly advance the matter and the trial will inevitably break down into individual trials. They say the individual inquiries will include: the specific injuries suffered and whether they were caused by JUUL products; what advertisements and promotions the individuals saw before purchasing JUUL products; what knowledge and experience the individuals had of nicotine; and, why the individuals decided to purchase and use JUUL products including as a smoking cessation aid. The defendants submit that the preponderance of individual issues renders a class proceeding inefficient and unmanageable and will not advance judicial economy.

[302] I agree with the plaintiffs that a class action proceeding is the preferable procedure.

[303] First, although there are clearly individual issues that will need to be resolved, in my view, the common issues predominate and will significantly advance the individual claims. The resolution of the common issues will determine, among many other things, the ingredients of JUUL products, whether JUUL products are unsafe or cause harm, whether the defendants misrepresented the addictive nature or the

safety of JUUL products, whether the defendants misrepresented JUUL products as a smoking cessation aid, whether the defendants deliberately targeted young people in their market and promotional campaigns, and whether there was, in fact, a conspiracy, as alleged. These are all fundamental issues that require resolution independent of the individual issues.

[304] Second, many of what the defendants call individual issues are not, in fact, individual issues but are characteristics that differentiate the proposed class members. For example: some class members are persons who purchased and used JUUL products while under the age of 26; some are persons who switched to JUUL products from traditional cigarettes; and some are persons who have suffered personal injuries beyond addiction. Additionally, although the class members will have purchased and used JUUL products during different marketing and promotional campaigns, these differences can be addressed by the creation of appropriate subclasses. The fact that groups of class members are differently situated will make the management of the proceeding more difficult but does not render it unmanageable.

[305] Third, the existence of individual issues, such as the injuries suffered by individuals and causation, do not preclude certification. Section 27 of the *CPA* specifically provides for separate determination of individual issues following determination of the common issues.

> 27(1) When the court determines common issues in favour of a class or subclass and determines that there are issues, other than those that may be determined under section 32, that are applicable only to certain individual members of the class or subclass, the court may
>
> > (a) determine those individual issues in further hearings presided over by the judge who determined the common issues or by another judge of the court,
> >
> > (b) appoint one or more persons including, without limitation, one or more independent experts, to conduct an inquiry into those individual issues under the Supreme Court Civil Rules and report back to the court, or
> >
> > (c) with the consent of the parties, direct that those individual issues be determined in any other manner.

> (2) The court may give any necessary directions relating to the procedures that must be followed in conducting hearings, inquiries and determinations under subsection (1).
>
> (3) In giving directions under subsection (2), the court must choose the least expensive and most expeditious method of determining the individual issues that is consistent with justice to members of the class or subclass and the parties and, in doing so, the court may
>
> > (a) dispense with any procedural step that it considers unnecessary, and
> >
> > (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

[306] Fourth, the only other available procedure to resolve the proposed common issues is individual legal proceedings. This would surely involve hundreds, if not thousands or tens of thousands, of individual actions. In no sense can this be said to promote judicial economy or efficiency.

[307] Fifth, and relatedly, only a class action proceeding will promote access to justice and behaviour modification. Many of the proposed class members will not have suffered serious personal injuries or otherwise have suffered significant monetary damages. Such class members are unlikely to pursue their legal remedies in individual actions because the costs would be excessive and disproportionate. This is especially so considering the economic disparity between the individuals and the defendants.

[308] Finally, there is no evidence that any putative class members wish to pursue these claims on an individual basis (*CPA*, s. 4(2)(b)) and no evidence that there are any other nationwide proceedings (*CPA,* s. 4(2)(c)). I note, however, that the intent of class counsel is to advance this claim Canada-wide on an opt-out basis as permitted by ss. 4.1 and 16 of the *CPA*.

[309] Accordingly, a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues once they are appropriately framed.

Section 4(1)(e) – Representative Plaintiff

Legal Principles

[310] Section 4(1)(e) of the *CPA* requires that there be a proper representative plaintiff who:

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

[311] Section 2(1) of the *CPA* further limits standing to commence a class action to "A resident of British Columbia who is a member" of the proposed class: *MM Fund* at paras. 74, 81-82.

[312] The requirement that a proper representative plaintiff be someone who will fairly and adequately represent the interests of the class was addressed in *Miller* at para. 75, where it was held that the representative plaintiff need not be representative of the whole class, have a typical claim, or be the best possible representative.

> [75] The representative plaintiff represents the class, but need not be representative *of* the class: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 21. He or she need not have a claim typical of the class, or be the "best" possible representative. Instead, the court must be satisfied that "the proposed representative will vigorously and capably prosecute the interests of the class": *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 41. …

Discussion

[313] I will first address the residency requirement in s. 2(1) of the *CPA*. I will then address the adequacy of the representative plaintiffs, the litigation plan and conflicts of interest.

Residency Requirement

[314] The Altria defendants challenge whether Mr. Mann-Campbell lived in British Columbia at all material times and additionally submit that Mr. Osborn cannot be a representative plaintiff as he is a resident of Ontario and, therefore, does not meet the standing requirement in s. 2(1) of the *CPA.* I disagree on both counts.

[315] Concerning Mr. Mann-Campbell, he deposes to living in British Columbia and there is no evidence whatsoever that he ever lived elsewhere.

[316] Concerning Mr. Osborne, I agree that he is not a resident of British Columbia. However, I do not read the *CPA* as requiring that every representative plaintiff be a resident of British Columbia. Section 2(1) of the *CPA* limits the persons who may commence a class action proceeding to "A resident of British Columbia" but does not expressly require that all plaintiffs be residents. Similarly, s. 4(1) does not contain a requirement that every representative plaintiff be a resident of British Columbia. In my view, it is sufficient if one of the representative plaintiffs is a resident of British Columbia. I am fortified in this by the decision of Justice Masuhara in *Tucci v. Peoples Trust Company*, 2017 BCSC 1525, at paras. 5, 7-8, 276-277 and 283, where he certified a class action involving two representative plaintiffs; one who resided in British Columbia and one who resided in Ontario.

Adequacy of the Plaintiffs

[317] The plaintiffs submit that Mr. Mann-Campbell and Mr. Osborn are proper representative plaintiffs as they share a common interest with other class members, are prepared to represent the interests of the class, are aware of their duties as representative plaintiffs, have no conflict of interest, have a grasp of the complexities and have put forward a workable litigation plan.

[318] The JUUL defendants submit that neither of the representative plaintiffs are adequate. In particular, they say Mr. Mann-Campbell suffered no compensable harm as he does not depose he ever quit smoking cigarettes and has provided no evidence of any injuries. Concerning Mr. Osborn, who deposes to smoking

cigarettes after ceasing JUUL products in 2021, they say his only injury is addiction and that it will be challenging to identify the cause of this.

[319] The Altria defendants submit that the evidence is insufficient to establish the representative plaintiffs will vigorously and capably prosecute the action.

[320] I see no merit in the defendants' submissions that Mr. Mann-Campbell and Mr. Osborne are not adequate representative plaintiffs. Mr. Mann-Campbell deposes that because of advertisements and his "desire to quit smoking", he began using JUUL products. He deposes that his cravings increased dramatically following his use of JUUL products. Mr. Osborne deposes that he never smoked cigarettes or used e-cigarettes prior to using JUUL products in 2019 and that he immediately became addicted. Both plaintiffs depose they are motivated to act as a representative plaintiff and that they are committed to seeing the matter through. Both plaintiffs depose to their understandings of the major steps required in the action and of their responsibilities as a representative plaintiff. Both plaintiffs depose that they are committed to fulfilling their responsibilities and to seeing the matter through.

[321] I accept that the only injury the representative plaintiffs depose to having suffered is addiction to nicotine, but that may also be the case for the majority of the proposed class. In any event, as I have indicated, it is not necessary that they be representative of the whole class, have a typical claim, or be the best possible representative. What is required is that they will vigorously and capably prosecute the interests of the class. I am satisfied they will do so.

Litigation Plan

[322] The proposed litigation plan is attached as a schedule to the notice of application. It is divided into various sub-headings addressing notice to class members, production of documents, examinations for discovery, examinations of non-parties, expert opinion evidence, refinement of common issues, dispute resolution, trial of the common issues, and determination of individual issues. The

plan contemplates reviews and modifications at periodic case management conferences, including mini-trials to resolve individual issues.

[323] The plaintiffs submit that the litigation plan is adequate as it addresses the requisite issues, demonstrates that the representative plaintiffs and class counsel have thought through the litigation, and provides a roadmap for the steps following certification.

[324] The defendants vigorously submit that the litigation plan is inadequate. They say it is mere boilerplate and does not contain the level of detail commensurate with the circumstances and complexity of the matter in a number of details.

[325] I agree with the defendants that the litigation plan is basic. However, this is not fatal. In *MacKinnon*, Horsman J., as she then was, held that a similarly minimalist plan was sufficient.

> [168] The plaintiffs' litigation plan is relatively minimalist. It includes provision for notice to the class, examinations for discovery, document production, the exchange of expert reports, and the conduct of a common issues trial. The defendants are correct that there is limited detail regarding the individual trials that may follow the common issues trial. The litigation plan appears to depend on the exercise of the court's case management powers under the *CPA*.
>
> [169] The purpose of a litigation plan is to provide a framework for the class proceeding that shows that the representative and class counsel understand the complexities of the case. It is not intended to resolve all procedural issues before certification has occurred. It can be anticipated that litigation plans will require amendment as the case proceeds: *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149 at paras. 57—61 [*Jiang* 2019].
>
> [170] As observed by the Court of Appeal at para. 61 of *Jiang 2019*, ss. 12, 27 and 28 of the *CPA* provide post-certification tools to address how individual issues will be resolved. The adequacy of a litigation plan may be viewed through the lens of the case-management tools available to the court post-certification.
>
> [171] In my view, the plaintiffs' proposed litigation plan is sufficient at this stage of the proceeding to satisfy the requirement in s. 4(1)(e)(ii) of the *CPA*.

[326] In *Fakhri et al. v. Alfalfa's Canada Inc. cba Capers*, 2003 BCSC 1717, aff'd 2004 BCCA 549, Justice Gerow addressed the purpose of a litigation plan and noted that the court should not overly scrutinize the plan at a certification hearing.

> [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members. *Hoy v. Medtronic,* at ¶ 81-82; *Scott v. TD Waterhouse Investor Services*, ¶ 164-167.

[327] The above comments of Gerow J. have been widely cited in this court and expressly approved by the Court of Appeal. In particular, in *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149, Justice Hunter approved of this approach.

> [57] The passage from *Fakhri* relied upon by the certification judge was noted with approval by Savage J.A. at para. 253 in *Godfrey v. Sony Corporation*, 2017 BCCA 302 and reflects the proper approach of a certification judge to the review of a litigation plan produced in compliance with s. 4(1)(e)(ii): see also *Lam v. University of British Columbia*, 2010 BCCA 325 at paras. 85–86. The purpose of the plan is to provide a framework for the class proceeding that shows that the representative plaintiff and class counsel understand the complexities of the case. It is not to resolve all procedural issues before certification has taken place. As Gerow J. pointed out in *Fakhri*, it can be anticipated that litigation plans will require amendment as the case proceeds.
>
> …
>
> [60] I do not take the Court's comments in *McCracken* to propose closer scrutiny of the litigation plan than that suggested by the *Fakhri* standard, but if it was intended to do so, I prefer the earlier dictum of the Ontario Court of Appeal in *Cloud v. Canada (Attorney General)* (2004), 2004 CanLII 45444 (ON CA), 73 O.R. (3d) 401 (C.A.):
>
> > [95] … The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress. It will undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Any shortcomings … can be addressed under the supervision of the case management judge once the pleadings are complete.
>
> [61] This passage was specifically approved by Savage J.A. in *Godfrey* at para. 252. It is also consistent with the observations of this Court in *Jiang #1 BCCA* that ss. 12, 27 and 28 of the *CPA* provide post-certification tools to address how individual issues will be resolved, observations that were expressly and properly referenced by the certification judge in the case at bar.

[328] In my view, the litigation plan proposed by the plaintiff, although basic, demonstrates an understanding of the complexities of the case and provides a suitable framework for moving this matter forward. The plan is sufficient to satisfy the requirement in s. 4(1)(e)(ii) of the *CPA.*

Conclusion

[329] I have identified multiple issues with the FANOCC, the class definition and the common issues as proposed that preclude certification of this class action at the present time. In particular:

a) The FANNOC must be amended

   i. by deleting the claim for damages for “purchasing and using JUUL products when they would not have otherwise done so” from para. 128 of the FANOCC,

   ii. by removing the claim of “toxic tort”,

   iii. to correct the ambiguity about direct sales by all of the defendants to consumers, and

   iv. by removing the claim in fraud;

b) The class definition in the FANOCC must be amended

   i. by replacing “and/or” with “and” and by including person who indirectly purchased Juul products,

   ii. by substituting “JUUL device” and “JUUL pods” for “JUUL products”;

   iii. by repositioning the phrase “in Canada” such that it precedes the phrase “for purposes that were primarily personal”; and

   iv. by deleting the words “family or household”; and

c) The proposed common issues must be amended as follows,

i. common issue 5 needs to be reworded to reference only JLC,

ii. common issues 9-12 are not common across the class but relate to only a potential sub-class who purchased directly from JLC. These questions cannot be certified until the pleading for breach of contract and breaches of the *SGA* is amended and then they will need to be re-worded to reference only JLC as the contract party and seller,

iii. common issues 13-16 must be broken down by jurisdiction and legislation, and must list the specific representations or omissions that are alleged to constitute the unconscionable or deceptive practice. Additionally, common issue 15 needs to address the issues identified in para. 264 of these reasons,

iv. common issues 17-20 must be amended to address the requisite elements of claims in negligence and failure to warn,

v. common issues 22-26 need to be reworded to address the legal requirements of the two types of conspiracy and to conform with the pleading, which, for unlawful means conspiracy, alleges only breaches of consumer protection legislation and the *TVPA*. Further, because the unlawful means conspiracy is, in part, for breaches of provincial consumer protection legislation, the issues must be broken down by jurisdiction and legislation, and

vi. common issue 28 must be amended to stipulate that the aggregate assessment is only in respect of the monetary claim for refunds or restitution and nominal damages for breach of contract.

[330] In view of the amendments that are necessary to the FANOCC, the class definition and the proposed common issues, pursuant to s. 5(6) of the *CPA*, I adjourn this application for certification to permit the plaintiff to make the necessary amendments.

"Giaschi J."