

CANADIAN PLAINTIFFS ACHIEVE A BREAKTHROUGH IN CERTIFYING PRICE FIXING CLASS ACTIONS

By Michael Osborne¹

Courts in two Canadian cases have recently made it easier to certify direct and indirect-purchaser class actions seeking damages for alleged price fixing. Prior to these decisions, the difficulty of proving damages suffered by indirect purchasers based on common evidence was a major impediment in certifying such actions.

The two decisions, *DRAM (Pro-Sys Consultants Ltd. v. Infineon Technologies AG)*² in British Columbia, and *Hydrogen Peroxide (or "HP", Irving Paper Ltd. v. Atofina Chemicals Inc.)*³ in Ontario, take different approaches, but reach the same result. In *DRAM*, the BC Court of Appeal court relied on theories that would allow recovery without proof of loss. The court said that aggregate assessment of damages can be used to establish liability, even though the statute says it cannot. In *HP*, the Ontario Divisional Court relied on the low standard of proof required at the certification stage, finding that the plaintiffs' expert had proposed a "credible and plausible" method of proving damages on a class-wide basis.

I. Canadian Causes of Action for Economic Wrongs

In Canada, as in the United States, price fixing is a criminal offence.⁴ Section 36 of the *Competition Act* allows victims of conspiracies to sue to for damages and costs,⁵ but punitive damages are not available.⁶ And while injunctions may be available,⁷ mandatory orders are not.⁸

Several common law causes of action permit recovery for economic wrongs as

well, including the torts of conspiracy, inducing breach of contract, unlawful interference with economic interests, intimidation, negligent misrepresentation, and deceit. These torts, particularly conspiracy, are frequently pleaded in association with section 36 actions because they open the door to punitive damages and injunctive relief.

Under both section 36 and the economic common law torts, proof of damage to the plaintiff is an essential component of liability. This has made it difficult for indirect-purchaser plaintiffs to achieve certification of class actions seeking recovery for damages caused by price fixing conspiracies.

II. Canadian Class Actions

Nine of Canada's ten provinces have legislation governing the certification of class actions.⁹ Broadly speaking, this legislation is modeled on, but is not identical to, Rule 23 of the Federal Rules of Civil Procedure.¹⁰ Certification of a class action requires the following:

1. The pleadings must disclose a cause of action;
2. There must be an identifiable class;
3. The claims of class members must raise common issues;
4. A class proceeding must be the preferable procedure; and
5. The proposed representative plaintiff must be able to represent

the class fairly, have a workable litigation plan, and not have a conflict of interest with other class members.¹¹

Unlike Rule 23, Canadian law does not require that common issues predominate. However, "the question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole."¹² Where individual issues overwhelm the common issues, certification is unlikely.¹³ Canadian class action statutes provide that damages can be assessed for a class on an aggregate basis, provided that "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."¹⁴

III. Proving Damages in Class Actions and the Pass-On Problem.

Because damages are an essential element of liability in an action for conspiracy, liability cannot be a common issue unless the fact of damages can be proved on a class-wide basis. While proving that direct purchasers were forced to pay more because of a conspiracy is not especially difficult, proving that indirect purchasers paid more runs into the pass-on problem. That is, it is difficult, if not impossible, to prove on a class-wide basis that for each indirect purchaser, every intermediate purchaser in the chain above passed on some or all of the overcharge. Until recently, Canada had been moving slowly

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toward rule in U.S. federal courts, which rejects the pass-on defense and restricts price fixing claims to direct purchasers.¹⁵ For instance, the Supreme Court of Canada has rejected the pass-on defense in a case involving unlawful taxes.¹⁶

The corollary, whether those to whom a loss was passed on can sue, was addressed in *Chadha v. Bayer*.¹⁷ In that case, the court denied certification because the plaintiffs failed to show how they would prove on a class-wide basis that an overcharge resulting from an alleged conspiracy to fix prices for iron oxide pigments resulted in purchasers of houses containing the substance paid more. The distribution chain was long and complex, and iron oxide pigments formed a tiny part of the value of the houses.

After *Chadha*, plaintiffs began using a number of strategies to avoid the problems encountered in *Chadha*. These strategies included:

- Including both direct and indirect purchasers in the proposed class;
- Leading expert evidence on the issue of damages; and
- Pleading causes of action that may not require proof of loss, in particular, “waiver of tort claims.”

Waiver of tort began as an election of remedy. In certain circumstances the victim of a tort can “waive the tort,” and elect a remedy measured by the gain to the defendant instead of compensation for losses. Some argue that “waiver of tort” is an independent cause of action that exists to compel a wrongdoer to disgorge the profits gained through wrongdoing, even though the person claiming disgorgement has suffered no loss at all. So far, Canadian courts have refused to resolve the controversy at the interlocutory stage, and no waiver of tort case has gone to trial, leaving the issue unsettled.¹⁸

Until the *DRAM* and *HP* certification decisions, these strategies had not been tested.¹⁹

IV. The *DRAM* and Hydrogen Peroxide Class Actions

DRAM memory chips are used in computers, automobiles, mobile phones, GPS units, cameras, and other consumer electronic products. Several *DRAM* manufacturers recently pled guilty in the US (but not, to date, in Canada) to price fixing and paid large fines.

A proposed class proceeding was commenced in British Columbia alleging price-fixing contrary to the *Competition Act*, common law conspiracy, unlawful interference with economic interests, unjust enrichment, waiver of tort, and constructive trust. It proposed a class consisting all purchasers of *DRAM* chips (direct) or products containing *DRAM* chips (indirect) from 1999 to 2002. Not surprisingly, the indirect purchasers predominated.

In 2008, Mr. Justice Masuhara of the BC Supreme Court held that the proposed class action would degenerate into a series of individual trials.²⁰ Key issues, including whether the plaintiffs paid more because of the conspiracy, could not be determined on a class-wide basis, the court held. Aggregate assessment of damages is only available after liability has been established, the court noted, and thus does not solve the problem. The court further held that to succeed on the waiver of tort claim, the gain that the plaintiffs sought to recover must be referable to the class members; there must be a causal connection between the gain and the wrongful conduct. This, according to the court, could not be established on a class-wide basis. The plaintiffs appealed.

Hydrogen peroxide is a bleaching agent used in many industries. The pulp and

paper industry is by far the largest user of hydrogen peroxide in Canada.

In June 2006, Irving Paper Ltd. and others filed a class action in Ontario on behalf of direct and indirect purchasers against a number of producers and distributors of hydrogen peroxide and its “downstream products”²¹ alleging that they conspired to fix prices, allocate markets, and fix production of hydrogen peroxide and its downstream products from 1994 to 2005. The alleged conspiracy has been the subject of criminal enforcement action in Europe, the US, and Canada, and a class action in the US. In Canada, after reaching settlements with three sets of defendants in exchange for their cooperation against the non-settling defendants, the plaintiffs sought certification.

In opposing class certification, the defendants pointed to the complexity of the distribution chain for hydrogen peroxide. Madam Justice Rady rejected these concerns. Dealing with the main issue, whether the fact of harm and aggregate damages were appropriate common issues, Justice Rady held that two recent Ontario Court of Appeal decisions have overtaken *Chadha* and replaced the requirement of proving liability with a requirement to show “potential liability,” that is, whether “the defendants acted unlawfully.” The court also held that it is not necessary to establish that every class member suffered a loss.²²

Justice Rady then examined the expert evidence on proof of damages, finding that the plaintiffs’ expert “attempts to postulate” a methodology to calculate damages and thus met the requirement to show “some basis in fact, for the certification requirement at issue.”²³ Given these findings, the court had little difficulty concluding that a class proceeding was the preferable procedure.²⁴

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V. The Rulings on Appeal

The BC Court of Appeal handed down its decision in DRAM in November 2009, shortly after Justice Rady's decision in HP. The court certified the action as a class proceeding.²⁵

Writing for the court, Mr. Justice Smith focused on the unjust enrichment claim. Under the doctrine of waiver of tort, liability for unjust enrichment may be established on proof of wrongful conduct and resulting gain, and without proof of loss by the plaintiff, he noted.²⁶ The guilty pleas and fines in the US are admissions by the defendants of both wrongful conduct and resulting gain, establishing liability in the restitutionary actions, he concluded.²⁷ He also held that damages could be proven on a class-wide basis through statistical evidence and economic theory. Moreover, aggregate assessment of damages can establish liability, he held, even though the CPA requires that liability be established first.²⁸

Justice Smith also accepted that the plaintiffs' expert's methodology for estimating damages met the "some basis in fact" requirement for certification,²⁹ and that he should not attempt to resolve conflicts in the expert evidence.³⁰ Having determined that damages could be assessed as a common issue, Justice Smith easily determined that a class action was the preferable procedure. The defendants sought leave to appeal to the Supreme Court of Canada.³¹ But the court denied leave on June 3, 2010.³²

Then, on June 8, 2010, the Divisional Court denied leave to appeal from Justice Rady's decision to certify a class in HP.³³ Madam Justice Leitch disagreed with Justice Rady's view that the aggregate damages provision could be relied on before liability is established, to prove damages as a common issue.³⁴ But the Divisional Court ultimately denied leave

to appeal because Justice Rady had considered the evidence of the experts about the possibility of proving damages on a class-wide basis, and was satisfied that the plaintiffs' expert demonstrated a "credible and plausible" methodology for proving the fact and the amount of damages on a class-wide basis.³⁵ Justice Leitch stressed that a certification motion is not the place to determine the merits of the proposed action, even on a preliminary basis.³⁶

The Divisional Court in HP, however, did not deal with the problem that the methodology proposed by the plaintiff's expert appears to rely on an aggregate assessment of damages. After concluding that the conspiracy would have resulted in an overcharge to direct purchasers, the expert, Dr. Beyer, opined that "the alleged conspiracy would have impacted *some* indirect purchasers."³⁷ Thus, even the plaintiffs' expert did not offer a method for establishing that the defendants were liable to *all* members of the class. Rather, Dr. Beyer's methodology for calculating damages on a class-wide basis included "estimating" the impact on downstream purchasers.³⁸ He proposed to "determine aggregate damages" using an *estimated* but-for price and a multiple regression analysis.³⁹ Thus, to the extent that the "credible and plausible" methodology accepted by Justice Rady and affirmed by Justice Leitch relies on aggregate assessment of damages, it cannot be used until after liability is proven.

VI. Conclusion

In these matters, Canadian plaintiffs achieved a breakthrough in obtaining the certification of price-fixing class actions on behalf of direct and indirect purchasers. Both decisions, however, raise the concern that the strict requirements of the CPA relating to aggregate assessment of damages are being ignored in, what appears to be, a rush to ensure that wrongdoers do not profit from their wrongdoing.

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² 2009 BCCA 503.

³ 2010 ONSC 2705 (*Irving Paper – Div Ct.*).

⁴ Canada's criminal conspiracy provision pre-dates the Sherman Act by one year. In March 2010, Canada adopted a *per se* ban on agreements to fix prices, allocate markets, or fix production, subject to a codified ancillary restraints defence. Previously, agreements to lessen competition "unduly" were unlawful. *Competition Act*, R.S.C. 1985, c. C-34, s. 45, available online: <http://laws.justice.gc.ca/eng/C-34/index.html>

⁵ *Competition Act*, s. 36.

⁶ *Wong v. Sony of Canada Ltd.*, [2001] O.J. No. 1707 (S.C.J.)

⁷ In *Mead Johnson Canada v. Ross Pediatrics* (1996), 31 O.R. (3d) 237 (Gen. Div.) the court held that interlocutory injunctive relief was available under the court's inherent jurisdiction. Earlier cases held that injunctive relief was not available: *947101 Ontario Ltd. v. Barrhaven Town Centre Inc.* (1995), 121 D.L.R. (4th) 748 (Gen. Div.); *Aca Joe International v. 147255 Canada Inc.* (1986), 10 C.P.R. (3d) 301 (F.T.D.).

⁸ *Price v. Panasonic Canada Inc.*, [2000] O.J. No. 3123 (S.C.J.)

⁹ *Class Proceedings Act* ("CPA") unless noted: British Columbia, RSBC 1996, c. 50; Alberta, SA 2003, c. C-16.5; Saskatchewan, *The Class Actions Act*, S.S. 2001, c. C-12.01, Manitoba, C.C.S.M. c. C130; Ontario, S.O. 1992, c. 6; Quebec, *Code of Civil Procedure*, R.S.Q., c. C-25, Book IX "Class Action"; New Brunswick, S.N.B. 2006, c. C-5.15; Nova Scotia, S.N.S. 2007, c. 28; Newfoundland, *Class Actions*

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Act, SNL 2001 c. C-18.1. Class actions are available in the Federal Court: *Federal Courts Rules*, SOR/98-106, Part 5.1. Prince Edward Island and Canada's three territories do not have class action legislation, however, in *Western Canadian Shopping Centres v. Bennett Jones Verchere*, [2001] 2 S.C.R. 534, the Supreme Court ruled that a class action could be brought even in the absence of class action legislation.

¹⁰ Quebec, which has a civil law legal system, has class proceedings rules that are older and different from those in the other provinces.

¹¹ See for example: Ontario *Class Proceedings Act*, S.O. 1992, c. 6, s. 5; British Columbia *Class Proceedings Act*, RSBC 1996, c. 50, s. 4(1).

¹² *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at ¶30. This is expressly provided for in the BC *CPA*, s. 4(2)(a).

¹³ See for example *Hollick* at ¶32; *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (S.C.J.); *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 at ¶172 (S.C.J.); *Dennis v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 1332.

¹⁴ Ontario *CPA* s. 24; BC *CPA*, s. 29. *Chadha v. Bayer* (2003), 63 O.R. (3d) 22 at ¶60-61 (C.A.); *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781 at ¶42.

¹⁵ *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

¹⁶ *Kingstreet Investments v. New Brunswick (Department of Finance)*, 2007 SCC 1; see also *British Columbia v. Canadian Forest Products Ltd.* [2004] 2 S.C.R. 74.

¹⁷ (2003), 63 O.R. (3d) 22 (C.A.)

¹⁸ See for instance: *Serhan v. Johnson & Johnson*, [2009] O.J. No. 402 (Div. Ct.). For a discussion of this case, see M.

Osborne, "Restitution or windfall? Court certifies class action for consumers who suffered no damages", *The Litigator*, Nov. 2006, <http://www.thelitigator.ca/index.php/2006/11/11/restitution-or-windfall/>.

¹⁹ For a discussion of settlements post-*Chadha*, see M. Osborne, "And the Money Keeps Rolling (In and Out) – Conspiracy Class Action Settlements After *Chadha v. Bayer*", (2006) 22:3 Can. Comp. Rec. 115.

²⁰ *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575.

²¹ Sodium perborate and sodium percarbonate. Sodium perborate (NaBO₃) is formed by the reaction of hydrogen peroxide with two other chemicals, and sodium percarbonate (Na₂CO₃•1.5H₂O₂) is formed by the adduction of sodium perborate and hydrogen peroxide. Both are used in household bleaches.

²² *Irving Paper Ltd. v. Atofino Chemicals Inc.*, [2009] O.J. No. 4021 at ¶118 (S.C.J.) ("*Irving Paper – SCJ*"). The cases are *Markson* and *Cassano*.

²³ *Hague v. Liberty Mutual Insurance Co.*, [2004] O.J. No. 3057 (S.C.J.), quoted at *Irving Paper – SCJ*, ¶119.

²⁴ *Irving Paper – SCJ*, ¶153-156.

²⁵ Section 29.

²⁶ Relying on *Serhan*.

²⁷ *Pro-Sys*, BCCA, ¶33.

²⁸ BC *CPA*, s. 29(1)(a). Smith J.A. relied on *Knight v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 172, varied, 2006 BCCA 235, for this proposition.

²⁹ Following *Hollick v. Toronto (City)*, 2001 SCC 68 at ¶15

³⁰ Citing *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at ¶50, and *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.) at ¶76.

³¹ This is the Canadian equivalent to applying for *certiorari* to the US Supreme Court.

³² [2010] S.C.C.A. No. 32.

³³ *Irving Paper Limited v. Atofino Chemicals Inc.*, 2010 ONSC 2705 ("*Irving Paper – Div Ct.*"). The Divisional Court is a branch of the Superior Court that, among other things, hears appeals from interlocutory decisions. Leave is necessary to appeal a certification decision to the Divisional Court.

³⁴ *Irving Paper – Div Ct.*, ¶43-47.

³⁵ *Irving Paper – Div Ct.*, ¶55, 62.

³⁶ *Irving Paper – Div Ct.*, ¶56-61.

³⁷ *Irving Paper – SCJ*, ¶123 (emphasis added).

³⁸ *Irving Paper – SCJ*, ¶124.

³⁹ *Irving Paper – SCJ*, ¶125.