COURT FILE NO.: 47025

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
IRVING PAPER LIMITED, IRVING PULP & PAPER, LIMITED, 3969410 CANADA INC. c.o.b. as PARK AVENUE HAIR SALON, DISTRIBUTECH INC. and STACEY LEAVITT	Charles M. Wright, Linda Visser, Heather Rumble Peterson, Andrea DeKay & David Jones for the Plaintiffs
Plaintiffs	
- and -	
ATOFINA CHEMICALS INC., ARKEMA INC., ARKEMA CANADA INC., ARKEMA S.A., FMC CORPORATION, FMC of CANADA, LTD., SOLVAY CHEMICALS INC., SOLVAY S.A., DEGUSSA CORPORATION, DEGUSSA A.G., DEGUSSA CANADA INC., EKA CHEMICALS, INC., EKA CHEMICALS CANADA INC., AKZO NOBEL CHEMICALS INTERNATIONAL B.V., KEMIRA OYJ and KEMIRA CHEMICALS CANADA INC	Glenn Leslie & Bruce O'Toole for the Defendants Atofina Chemicals Inc., Arkema Inc., Arkema Canada Inc., Arkema S.A. Paul J. Martin & Laura F. Cooper for the Defendants FMC Corporation, FMC of Canada, Ltd.
Defendants	
	HEARD: January 21, 22 & 23, February 4 & 5, 2009

RADY J.:

Overview

[1] This is a motion to certify an action as a class proceeding on behalf of both direct and indirect purchasers of hydrogen peroxide and products containing or produced using hydrogen peroxide. The plaintiffs allege that the defendants conspired to and did, in fact, allocate

markets, restrict supply and increase the price of hydrogen peroxide in Canada between January 1, 1994 and January 5, 2005. For reasons elaborated below, the plaintiffs seek certification against the Arkema and the FMC defendants.

[2] Hydrogen peroxide (chemically described as H_20_2) is an inorganic chemical used in many applications as a bleaching or oxidizing agent. It is differentiated in grade and concentration. The pulp and paper industry, where hydrogen peroxide is used in the pulp bleaching process, is the largest consumer of hydrogen peroxide in North America. In 2001, the Canadian pulp and paper industry accounted for approximately 92.3% of hydrogen peroxide consumption by volume. Canadian pulp and paper production is largely exported to the United States. Less than 20% is consumed domestically. Other industries or applications that use hydrogen peroxide include mining, chemical manufacturing, textile bleaching, municipal wastewater treatment, treatment of soil contamination, food processing and the manufacture of semiconductors. It is used as well as a disinfectant and in very high concentration as a propellant. Hydrogen peroxide decomposes into water and oxygen and as a result is considered an environmentally sustainable chemical, preferable to the use of chlorine. This property has led, in part, to growth in the use of hydrogen peroxide in industrial and commercial applications.

[3] The alleged conspiracy has been the subject of a criminal investigation in Europe and the United States. The European Commission has concluded that nine companies (including several of the defendants) participated in a cartel in the European hydrogen peroxide market. Eight of the nine companies charged were fined as follows:

(i) Solvay was fined €167,062,000, which included a 10% fine reduction for cooperation;

(ii) Arkema was fined €78,663,000 which included a 30% reduction for cooperation;

(iii) Akzo Nobel/Akzo Nobel Chemical Holdings/EKA Chemicals AB was fined €25,200,000, which included a 40% reduction for cooperation;

(iv) FMC Corporation was fined €25,000,000;

(v) Kemira was fined €33,000,000;

(vi) Edison/Ex-Ausimont (now Solvay Solexis) was fined €58,125,000;

(vii) Snia/Caffaro was fined €1,078,000;

(viii) Degussa was found to have participated in the cartel, but its fine was discounted 100% for cooperation.

[4] The ninth company, Air Liquide, was found to have participated in the cartel but was not fined because the period in which to attribute fines had expired.

[5] The European Commission found that the companies had exchanged commercially important and confidential information, had limited production, allocated market shares and customers and fixed prices of hydrogen peroxide between 1994 and 2000.

[6] FMC has appealed against the fine. It is not clear from the record whether Arkema has also appealed or the disposition of the appeal(s).

[7] In the United States, two defendants have pleaded guilty to criminal charges of price-fixing in the U.S. market and elsewhere. In particular, Solvay S.A. and Akzo Nobel Chemicals International B.V. have agreed to pay fines of U.S. $40.8 million and U.S. $32 million respectively. In addition, FMC Corporation and Kemira Group have received subpoenas for documents from a grand jury in the U.S. investigating anti-competitive conduct although it appears that those subpoenas were issued in 2005 and no further steps have been taken to advance the matter.

[8] I pause here to note that I did not consider it necessary to review the supplementary affidavit of Wayne Wolfe in reaching a decision on certification and therefore need not rule on its admissibility.

Procedural Background

[9] This action was commenced by statement of claim as amended on June 29, 2006. Similar litigation is ongoing in Québec and British Columbia as well as in the United States.

[10] On January 19, 2007, the U.S. litigation was certified on behalf of a direct purchaser class, described as follows:

> All persons or entities, including state, local and municipal government entities but excluding federal government entities (excluding defendants, and their parents, predecessors, successors, subsidiaries and affiliates) who purchased hydrogen peroxide, sodium perborate and sodium percarbonate collectively "Hydrogen Peroxide") in the United States, its territories and possessions, or from a facility located in the United States, its territories and possessions, directly from any of the defendants, or any of their parents, predecessors, successors, subsidiaries and affiliates, at any time during the period from September 14, 1994 to January 5, 2005.

[11] The following issues were found to be common to the U.S. class:

(a) Whether defendants and others engaged in a combination and conspiracy to fix, raise, maintain, or stabilize prices; allocate customers and markets; or control and restrict output of hydrogen peroxide, sodium perborate, and sodium percarbonate sold in the United States;

(b) The identity of the participants in the alleged conspiracy;

(c) The duration of the alleged conspiracy and the nature and character of the defendants' acts performed in furtherance of it;

(d) The effect of the alleged conspiracy on the prices of hydrogen peroxide, sodium perborate, and sodium percarbonate during the class period;

(e) Whether the alleged conspiracy violated the *Sherman Act;*

(f) Whether the activities alleged in furtherance of the conspiracy or their effect on the prices of hydrogen peroxide, sodium perborate, and sodium percarbonate during the class period injured named plaintiffs and the other members of the class;

(g) The proper means of the calculating and distributing damages.

[12] On March 5, 2008, the defendants in this proceeding (except the Solvay defendants) brought a motion for an order disqualifying the plaintiffs' expert, Dr. John Beyer, from providing opinion evidence. The motion was dismissed in reasons dated April 15, 2008 and leave to appeal to the Divisional Court was denied.

[13] The plaintiffs in the Canadian proceedings subsequently reached three separate settlements, with the Solvay defendants, the Degussa defendants and the Eka, Akzo defendants respectively. The action was certified on consent against these entities and the three settlements were approved by this court. The settling defendants have agreed to cooperate with the plaintiffs as (and if) this litigation proceeds against the non-settling defendants, who I refer to as the FMC and Arkema defendants.

The Parties

[14] Irving Paper Limited and Irving Pulp & Paper Limited are New Brunswick corporations with their registered offices in Saint John, New Brunswick. Irving Paper operates a paper mill there and during the proposed class period purchased approximately $11 million of hydrogen peroxide from the defendants for use in the manufacture of newsprint. Irving Pulp and Paper operates a pulp mill in Saint John and it purchased approximately $20 million of hydrogen peroxide during the relevant period. Distributech is described in the statement of claim as a Canadian corporation that provides outsourced and marketing solutions to other businesses and it purchased products during the class period produced using hydrogen peroxide.

[15] FMC is a chemical company operating in the agricultural, industrial and consumer markets. It has three North American plants located in Texas, British Columbia and Mexico. A fourth plant in West Virginia ceased operation in 2003. FMC sold hydrogen peroxide to approximately 36 direct purchasers in Canada during the class period.

[16] Arkema Canada Inc. operates a hydrogen peroxide manufacturing plant in Bécancour, Quèbec. Arkema Inc. operates a second facility in Memphis, Tennessee. Arkema sells hydrogen peroxide to pulp and paper customers in Canada. It sold hydrogen peroxide to approximately the same number of direct purchasers during the same period.

The Parties' Positions

[17] The plaintiffs' submission can be briefly stated as follows:

1. the pleadings disclose a cause of action;

2. there is an identifiable class;

3. the proposed common issues will advance the litigation;

4. the representative plaintiffs and the litigation plan are adequate;

5. the plaintiff's economic evidence supports certification;

6. a class proceeding is the preferable procedure;

7. the goals of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 as amended are met through certification.

[18] The defendants forcefully submit that the court must fulfill a strict gatekeeper function, carefully scrutinizing the claim and if it does so, it will inevitably conclude that there are insurmountable problems that stand in the way of certification.

[19] In particular, the proposed class, including as it does all direct and indirect purchasers of hydrogen peroxide, is enormous. The class period, spanning eleven years, is extremely long. Consequently, it is conceivable that the class could potentially include all residents of Canada.

[20] The hydrogen peroxide products that form the subject matter of the litigation are said to be a diverse set of chemicals with different applications and end-users. Not all of those products are produced by all of the defendants and many of the products are unique to particular defendants. The products include various grades sold to different end-users, including those in industries such as pulp and paper, cosmetics, laundry detergent, rocket fuel and electronics. Not surprisingly, each industry has its own demand and supply characteristics and pricing idiosyncrasies. By way of illustration, Arkema led evidence of the duration, pricing and price change mechanisms of a number of sample contracts with direct purchasers. The price charged per metric tonne was highly variable from customer to customer. Some customers were entitled to rebates, usually based on the location of the shipment and the volume of product purchased. Hydrogen peroxide is sold to pulp mills on a delivered price basis and transportation costs have an impact on pricing. So too does the provision of technical services and equipment.

[21] The defendants submit that the plaintiffs cannot establish harm or damage on a class-wide basis and the plaintiffs' proposed use of aggregate damages is untenable. They urge that aggregate damages is merely a mechanism to award damages once liability is found and it cannot be used to avoid the need to prove liability in the first place.

[22] Further, there are serious issues with respect to "pass-on", which occurs when direct purchasers pass on some or all of any price increase to indirect purchasers. The evidence required to demonstrate any overcharge and whether it was actually included in the purchase price at all points in the distribution chain is complex and either unavailable or too costly to obtain.

[23] The defendants are extremely critical of the methodology proposed by Dr. Beyer and they have their own expert opinion from Dr. Richard Schwindt in support of those criticisms. They submit that complex individual inquiries are required which overwhelm the proceeding.

[24] In short, the defendants urge that the proposed class proceeding is unmanageable and wholly unsuitable for class treatment.

[25] It is interesting to note that all parties refer to *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Div. Ct.); aff'd (2003), 63 O.R. (3d) 22 (C.A.) in support of their positions. *Chadha* was the first contested price-fixing certification motion in Canada, involving a proposed class of indirect purchasers of brick pigment. The defendants note that the decision of the motions judge granting certification was overturned on appeal to the Divisional Court, a decision upheld at the Court of Appeal. The defendants assert that the same problems that existed in that case arise here and they have not been adequately addressed by the plaintiffs.

[26] On the other hand, the plaintiffs welcome *Chadha* because they say it set out a road map which they say they have followed to its logical destination, namely certification.

[27] I will return to *Chadha* below.

The Law

An Overview

[28] It is helpful to set out first the general propositions of law regarding the certification of all class proceedings and move to an examination of price-fixing cases in particular.

[29] Section 5 of the *CPA* provides the criteria for certification as follows:

> The court shall certify a class proceeding on a motion under s. 2, 3, or 4 if;
>
> a) the pleadings or the Notice of Application discloses a cause of action,
>
> b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> c) the claims or defences of the class members raise common issues;
>
> d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> e) there is a representative plaintiff or defendant 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 the class members of the proceeding; and
>
> iii) does not have, on the common issues for the class, an interest in conflict of other class members.

[30] Section 6 of the *CPA* sets out a number of factors that shall not constitute a bar to certification. Section 6 provides:

> The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> 2. The relief claimed relates to separate contracts involving different class members;
>
> 3. Different remedies are sought for different class members;

4. The number of class members or the identity of each class member is not known; and

5. The class includes a sub-class whose members have claims or defences that raise common issues not shared by all class members.

[31] Section 24 of the *CPA* sets out when the court may determine the aggregate or part of a defendant's liability to class members. It provides as follows:

> The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (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.

[32] The Supreme Court of Canada and the Ontario Court of Appeal have given guidance to motions judges about the approach to be taken to a certification motion. The *CPA* is to be given a broad and liberal interpretation. It should be construed generously and an overly restrictive approach must be avoided in order to realize the objectives of the legislation, namely access to justice, judicial economy and behaviour modification: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158; *Cloud v. Canada* (Attorney General) (2004), 73 O.R. (3d) 401 (C.A.).

[33] The "*Hollick* approach" has been reiterated in decisions such as *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.); *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. no. 1; *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.), leave to appeal to S.C.C. refused, [2007] S.C.C.A. no. 346; and *Cassano v. The Toronto Dominion Bank*, (2007), 47 C.P.C. (6th) 209 (Ont. C.A.), leave to appeal to S.C.C. refused, [2008] S.C.C.A. no. 15.

[34] A certification motion is not meant to be a test of the merits of the action. The question at the certification stage is not whether the plaintiff's claims are likely to succeed on the merits but, rather, whether the action can be appropriately prosecuted as a class proceeding.

[35] With that general background, I propose to turn now to price-fixing conspiracy cases.

Price-Fixing Conspiracies

Background

[36] Cases involving allegations of price-fixing have received little judicial comment in Canada, particularly in the context of a contested certification motion. This is because only a few such cases have proceeded to a contested certification hearing. Most of these claims are resolved by settlement negotiated in advance of certification, which then proceeds on consent subject, of course, to court approval. For those cases that have proceeded to a certification hearing, the results have not been encouraging to plaintiffs. I propose to review some of the case law touching on certification for the purposes of settlement as well as contested certification motions.

Certification Post-Settlement

[37] In *Bona Food Ltd. v. Ajinomoto U.S.A. Inc.*, [2004] O.J. No. 908 (S.C.J.), an action was brought on behalf of all persons who purchased MSG and/or nucleotides or products containing either. It was alleged that the defendants had conspired to fix prices and allocate the market share of MSG and nucleotides, for a period of 15 years, from 1984 to 1999. The matter was before the court for settlement approval.

[38] Justice Cullity granted certification and approved the settlement. He concluded that it was not plain and obvious that the plaintiff could *not* succeed on the causes of action pleaded in its amended statement of claim and that the proposed common issues were acceptable. Cullity J. noted, however, that the class proposed was so broad that it might have been difficult to certify if contested:

> **23** Insofar as the class includes consumers who purchased the substances, it is, of course, extremely broad. While this may be relevant to the question

> whether the settlement is fair and reasonable, and could be of relevance to issues relating to the preferable procedure if certification was contested, I do not believe it detracts from the existence of an identifiable class for settlement purposes.
>
> . . .
>
> **27** If certification had been contested in this case, the plaintiffs may well have encountered difficulty in persuading the court that the requirement in section 5(1)(d) was satisfied and, in particular, that a manageable procedure could be established for proving loss on an individual basis if this were found not to be amenable to a trial of common issues. The analysis of the Court of Appeal in *Chadha* would, I presume, have been relied on by the defendants despite the evident attempt made on behalf of the plaintiffs to frame the action with that analysis in mind. The proposed settlement does, however, provide for a procedure that would avoid such problems and, if it is found to be fair to - and in the interests of - class members, I do not see why it should be ignored for the purposes of certification. The comment of Nordheimer J. that I have already quoted is, I believe, in point. The goals of access to justice and behavioral modification will be advanced and, unlike the finding in *Chadha*, judicial economy will not be undermined.

[39] Similarly, in *Vitapharm Canada v. F. Hoffman-LaRoche Ltd.*, [2005] O.J. No. 1118 (S.C.J.), the plaintiffs moved for certification against the settling defendants in an action alleging price-fixing of vitamins and vitamin-related products. In approving the settlement, Cumming J. held that it achieved the legislative goals of the *CPA* and enabled both judicial efficiency and access to justice for class members through a cost-effective distribution mechanism. The settlement was held to provide fair and reasonable benefits to class members in return for the compromise of their litigation rights.

[40] Cumming J. noted that a national class which included members in all provinces and territories except British Columbia and Québec (consumers only) was appropriate. With respect to certifying a class in a price-fixing action, Cumming J. had the following observation:

> **34** Price-fixing conspiracy cases by their nature, deal with common legal and factual questions about the existence, scope and effect of an alleged conspiracy. Putative class members have a common interest in any proof of a concerted action, conspiracy and of agreement with the aim and result of restricting trade. In Re Sugar Industry Antitrust Litigation 73 F.R.D. 322 (E.D. Pa. 1976) at 335.
>
> **35** In the United States, it is widely accepted that:

> [An] allegation of price-fixing ... will be viewed as a central or single overriding issue or a common nucleus of operative fact and will establish a common question. Herbert B. Newberg & Alba Conte, Newberg on Class Actions, 3d. ed. (Colorado: Sheppards/McGraw-Hill, 1992) at 18-15 to 18-21.
>
> **36** If each class member in the subject class actions proceeded individually against the Defendants, each would have to prove the existence and impact of the identical conspiracy to fix prices and allocate markets. Therefore, in each of these actions the common issue satisfies the test of advancing the proceeding and avoiding duplication of the fact-finding and legal analysis. Rumley, supra, at para. 29.

[41] Leitch R.S.J., in the more recent *799376 Ontario Inc. (c.o.b. Lonsdale Printing Services) (Trustee of) v. Cascades Fine Papers Group Inc.*, [2008] O.J. No. 5280 (S.C.J.) considered a motion for certification post-settlement in an action relating to price-fixing in the market for carbonless paper sheets. In granting certification of the settlement class, to which the defendants had consented, Leitch R.S.J. summarized the requisite considerations as follows:

> **10** It is also clear that there is an identifiable class that has an interest in the resolution of the proposed common issue.:..
>
> **11** This proposed definition provides objective criteria for identifying the class members. The definition makes clear the persons who potentially have a claim in this action, are entitled to notice of certification and will be bound by the Settlement Agreement.
>
> **12** The claims of the class members raise a common issue:
>
> > During the Class Period, did the Defendants agree to unduly prevent or lessen competition in respect of the sale of Carbonless Paper Sheets in Ontario and Quebec?
>
> **13** The resolution of this issue in a class proceeding will avoid duplication of fact-finding and legal analysis. As the plaintiff noted, if these issues were not brought forward as a class proceeding, each class member in an individual action against the defendants would have to prove the existence and impact of the identical conspiracy to fix prices. Therefore there is no issue that a class proceedings is the preferable procedure because it represents a fair, efficient and manageable procedure for determining the common issue. Certification of this action for settlement purposes accords with the policy objectives of the class proceedings: access to justice, judicial economy and the modification of the behaviour of the wrongdoers.

[42] It appears, therefore, that a class may be certified in an alleged price-fixing action, provided its prospective members share a common issue and the class-action litigation would avoid multiple claims as well as duplication of fact finding and legal analysis. On the other hand, the size of the class may have an impact on manageability. I do not read the comments of Justices Cumming, Cullity or Leitch as being restricted to certification for the purposes of settlement approval.

Disputed Certification Motions

[43] I turn then to the few disputed certification cases.

[44] In *Carom et al. v. Bre-X Minerals Ltd. et al.* (1999), 44 O.R. (3d) 173 (S.C.J.), Winkler J. (as he then was) considered several actions and claims for certification. Bre-X was an Alberta company developing gold-mining properties in Indonesia. Eventually, it was revealed that the gold samples provided to its investors had been salted. Various representative plaintiffs, who were shareholders, commenced eight class proceedings on behalf of proposed classes of persons who had purchased Bre-X shares and had suffered a loss.

[45] The main action (Bre-X-Carom I action) was brought against Bre-X and its various representatives. It claimed that the defendants increased the price of Bre-X shares for its own benefit through conspiracy and fraudulent and negligent misrepresentation,. The second action (the SNC-Lavalin-Carom II action) was brought against the engineering companies that analyzed the gold resources. Alleging the public would have relied on their statements about the gold used in Bre-X publications, claims of negligence and negligent misrepresentation were advanced. The remaining actions were against the brokerage firms and analysts employed by them, who allegedly had promoted Bre-X stock.

[46] Winkler J. stated that certification should proceed in stages. It should first be determined whether there was a cause of action and second whether there was an identifiable class. It was held that the Bre-X-Carom I action should be certified except for the claim for negligent misrepresentation and the claims against Bre-X related companies NB Inc. and FMS Ltd. The other motions for certification were dismissed.

[47] Winkler J. emphasized that there must be an issue common to the class, and the resolution of that issue must move the litigation forward in a meaningful and productive fashion. Common issues, however, are not required to be identical common causes of action. He noted as follows at p. 193:

> In *Bywater* this court stated at para. 12:
>
> > The presence of common issues is at the very centre of a class proceeding. It is the advancement of the litigation through the resolution of the common issues in a single proceeding which serves the goals of the Act. It is clear from the language of s. 5(1)(c) that the Act contemplates that there be a connection between the common issues, the claims or defences and the class definition. In like fashion, the common issues must have a basis in the causes of action which are asserted.
>
> For the purposes of a class proceeding, common issues are not synonymous with common causes of action. Multiple plaintiffs may assert similar claims against a common defendant or defendants without raising common issues. The necessary nexus for certification is that the claims asserted raise "common, though not necessarily identical" issues of fact or law. Hence, the claims, and the circumstances in which they are raised, must be analyzed to determine whether common issues are present.
>
> A common issue must have sufficient significance in relation to the claim asserted such that its resolution will advance the litigation. Furthermore, the resolution of the common issue must advance the litigation in a meaningful way. As stated by Sharpe J. in Rosedale Motors Inc. v. Petro-Canada Inc. (1998), 42 O.R. (3d) 776 at p. 785, [1998] O.J. No. 5461 (Gen. Div.):
>
> > In determining what will move the litigation forward, it is important not to get lost in the details of a long list of issues, comprised of some, but not all, elements of the various causes of action that are pleaded. It is important to keep in mind the cause of action as a whole. How does the proposed common issue relate to the other issues that will have to be decided? Can it be said, in the context of the other issues and the cause of action as a whole, that the determination of the proposed common issue will actually decide and dispose of one aspect of the case that will move the litigation forward? Are there other significant issues that have not been identified as either a common issue or an individual issue that should be taken into account in assessing the issues that are identified?

[48] Judicial consideration of the common issues aspect of certification need not involve an exhaustive analysis but should survey the overall litigation and consider the general cause of action. As further discussed at p. 194, he noted:

> The sense of a common issue in the context of a class proceeding is, therefore, one which will not only move the litigation forward as a matter of logic, but is an issue in respect of which a finding will contribute to the case in a legally material way.

[49] Winkler J. held that the allegations of fraud and conspiracy represented significant common issues and they were certified. The claim of negligent misrepresentation, however, did not raise a common issue or, if it did, it would have been discernible only after multiple individual evidentiary findings. He had the following observation:

> A reduction of the numerous representations to a common representation requires analysis and characterization of each individual representation, the plaintiff's perception of the representation and the circumstances in which it was made. This is, of necessity, an individual inquiry. Thus, the plaintiffs contention that a multitude of statements can be reduced to a single core representation is antithetical to the essence of a common issue in a class proceeding. That is to say, that the common trial in the class proceeding is intended to resolve issues which have been determined to be common between the defendants and the plaintiff class. As such, a resolution binds every class member. The existence of the common issue must be discernible at the certification stage since it provides the basis for the common issue trial and the viability of a class proceeding. The common issue cannot be dependent upon findings which will have to be made at individual trials, nor can it be based on an assumption to circumvent the necessity for the individual inquiries. As such, there is no prospect of a resolution in a trial on common issues which would advance this litigation in any manner as it relates to the claim in negligent misrepresentation.

[50] The Court of Appeal agreed with Winkler J.'s analysis of common issues with respect to certification. However, it overturned both Winkler J. and the Divisional Court (46 O.R. (3d) 415 (Div. Ct.)) with respect to the claim for negligent misrepresentation in the Bre-X-Carom I action and certified it ((2000), 51 O.R. (3d) 236 (C.A.)). Justice MacPherson noted that both the Ontario legislature in drafting the *CPA* and the judiciary in interpreting it, have made a conscious attempt to avoid setting the bar for certification too high. He went on to emphasize:

> The important procedural objectives of the *CPA*, namely promoting access to justice and judicial economy, would not be realized if there was a requirement that the prospective plaintiffs in a class action present absolutely identical issues of fact or law.

[51] In *Chadha et al v. Bayer Inc. et al* (1999), 45 O.R. (3d) 29 (S.C.J.), the plaintiffs alleged a conspiracy by the defendants to fix the price of iron oxide used in concrete bricks contrary to s. 45(1)(c) of the *Competition Act*. It was alleged that ultimate purchasers of

concrete bricks would have incurred an increased cost of $70-$112 on a $150,000 home. After the defendants failed to have the claim dismissed under Rule 21, the plaintiffs sought certification pursuant to the *CPA*.

[52] Sharpe J. (as he then was) noted that there does not necessarily need to be an explicit list of individuals to realize a 'class' for certification purposes. He had this to say on the issue:

> The test to be applied to the identifiable class requirement was recently discussed in Robertson v. Thomson Corp. (1999), 43 O.R. (3d) 161 at p. 169, [1999] O.J. No. 280 at paras. 24 and 26 (Gen. Div.):
>
> > The fact that it would be difficult at the certification stage to list by name every member of the class is not fatal. The Act contemplates situations where it may be difficult to identify by name precisely every member of the class: see Anderson v. Wilson (1998), 37 O.R. (3d) 235 at pp. 248-49, 156 D.L.R. (4th) 735 (Div. Ct.), citing with approval the Ontario Law Reform Commission Report on Class Actions, vol. 2, p. 373:
> >
> > > The mere fact that the court may be required to enter upon a relatively elaborate factual investigation in order to determine class membership, it would seem from Naken, does not render the class definition any less adequate.
> >
> > .....
> >
> > ... the class should be defined in objective terms, and that circular definitions referencing the merits of the claim or subjective characteristics ought to be avoided. Such definitions make it difficult to identify who is a member of the class until the merits have been determined. Definitions based upon the merits of the claim also violate the statutory policy that the merits are not to be decided at the certification stage.

[53] Finding then that the *CPA* in fact contemplated class members who are not instantly recognizable or listed, Sharpe J. granted certification. Although the class as defined by the plaintiffs was somewhat unwieldy, it nonetheless provided "in the abstract, clear and objective criteria to determine who is and who is not a member of the class". In further fleshing out the definition of 'class', Sharpe J. turned to *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.), and provided the following definition of class at p. 36:

> With reference to the purpose of class definition, Winkler J. stated as follows in Bywater v. Toronto Transit Commission, [1998] O.J. No. 4913 (Gen. Div.) at para. 10:
>
> > The purpose of the class definition is threefold: a) it identifies those persons who have a potential claim for relief against the defendant; b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its

> result; and lastly c) it describes who is entitled to notice pursuant to the Act. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow nor unduly broad.

[54] However, the Divisional Court overturned Sharpe J. and refused certification ((2001), 54 O.R. (3d) 520 (Div. Ct.)). It found that Sharpe J. erred in finding that a class action was the "preferable procedure" for claims brought by indirect purchasers. His interpretation of s. 5(1)(d) of the Act was considered to be inconsistent with both the express provisions of the Act and prior judicial interpretations of the "preferable procedure" requirement. The court reasoned as follows:

> Therefore, the following factors should be considered when applying s. 5(1)(d) of the Act: the nature of the proposed common issue(s); the individual issues which would remain after determination of the common issue(s); the factors listed in s. 6 of the Act; the complexity and manageability of the proposed action as a whole; alternative procedures for dealing with the claims asserted; the extent to which certification furthers the objectives underlying the Act; and the rights of the plaintiff(s) and defendant(s).

[55] The Divisional Court was troubled by the difficulties that the respondent-plaintiffs would ultimately face proving damages, considering the extent of passing on in building construction and purchasing. On this issue, Thomson J. wrote at pp. 543-44:

> The respondents face insurmountable problems of proof with respect to the "pass on" issue given the large number of parties in the chain of distribution and the multitude of variables affecting the end purchase price of a building. See the Chain of Distribution -- Iron Oxide Pigment illustration included as an Appendix to these reasons [p. 554, post]. These problems of proof are compounded by the fact that the product in question, iron oxide, is used merely as a small component in another product or series of products and the alleged overcharge is only a trivial part of the purchase price of residential or commercial buildings, which are highly individualized end products. Assuming that the respondents can establish that the appellants engaged in a conspiracy that increased the price of iron oxide, they will still have to establish on balance that this price increase was "passed on" to them. This they are unable to do on a class-wide basis. For a discussion of the problems of proof involved in actions such as the one at bar, see C.S. Coutroulis and D.M. Allen, "The Pass-On Problem in Indirect Purchaser Class Litigation" (Spring 1999) The Antitrust Bulletin 179.

[56] The inability of end-purchasers, such as homeowners, to precisely quantify their damages meant that they could not be constituted as a class. Subsequent litigation would be

required to determine their damages and as a result, certification would not advance the litigation forward in any meaningful way. As Thomson J. continued at p. 546:

> [31] I have concluded that even if the respondents succeed in establishing the existence of a conspiracy which resulted in an increase in the price of iron oxide, this would not advance the litigation in a legally material way. Rather, such a resolution would signal ". . . but the beginning . . . of the liability inquiry" (Abdool, supra, at p. 475 O.R., per Moldaver J., as he then was). Each plaintiff would still be required to establish, on an individual basis, that he or she suffered loss or injury that was caused by the acts of the appellants.
>
> [32] This is because the appellants will only be liable to the respondents if the latter succeed in proving that the artificially inflated price of iron oxide was passed on to them through the various links in the chain of distribution. This "pass on" issue cannot be resolved on a class wide basis because each claim involves different intermediaries and factors, as discussed earlier. This is not a situation such as the one in Kansas v. Utilicorp United Inc., 497 U.S. 199 (1990) (in which the Supreme Court of the United States nonetheless held that only the direct purchaser had a cause of action under s. 4 of the Clayton Act) where there was a "perfect and provable pass-on of the allegedly illegal overcharge" because government regulation, rather than market forces, determined the amount of overcharge that the direct purchaser passed on to the end purchaser. This problem of "tracing" the price increase, if any, through the levels of distribution at issue in the instant case is compounded by the fact that the purchase price of the end product, namely homes and other structures, depends on a number of variables unique to each claim.

[57] The Court of Appeal agreed with the Divisional Court ((2003), 63 O.R. (3d) 22 (C.A.)). Feldman J.A. observed that certification was not appropriate because the plaintiffs had failed to provide an adequate evidentiary basis to establish loss, which was an essential component of liability. Feldman J.A. wrote the following:

> [65] In my view, the question of whether and how consumers will be able to use class actions to obtain relief from price-fixing by suppliers and manufacturers remains an open one in this jurisdiction. The appellants were unsuccessful in this case because they did not present the evidentiary basis for a certifying court to be satisfied that loss as a component of liability could be proved on a class-wide basis. Whether such evidence could have been obtained is not clear. [p. 45]
>
> [66] The Divisional Court's approach suggested that it could not: that the variables in house purchase prices were such that the type of evidence that would have been required to show "pass-through" on a class-wide basis would not have been available in this case, in large part because of the nature of real estate and the individualized pricing factors on each sale. The Divisional Court's concerns follow the U.S. approach as defined in the Illinois Brick and Hanover Shoe cases.

[58] It is helpful to briefly touch on the *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977) and *Hanover Shoe Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968), both American decisions of the U.S. Supreme Court. In those cases, which sought damages under federal antitrust legislation, the court held that an action might only be brought by first or direct purchasers. Indirect purchases such as ultimate consumers or intermediaries in the chain of distribution were found to have no standing to sue. Nevertheless, class actions seeking damages on behalf of indirect purchasers may now be brought under the many state "repealer" or consumer protection statutes, which provide indirect purchasers with the authority to seek damages for antitrust violations.

[59] There has been criticism of the approach taken in the *Hanover Shoe* and *Illinois Brick* decisions and in one report commissioned by the President and Congress referenced in the plaintiffs' factum, the antitrust modernization commission has recommended that Congress overrule these decisions to the extent necessary to permit both direct and indirect purchasers to recover their losses.

[60] Returning then to *Chadha,* Feldman J.A. referred to a discussion of the *Illinois Brick* decision in the U.S.:

> [67] The difficulties with proving pass-through of price increases on a class-wide basis are illuminated in an article that discusses Illinois Brick. (William H. Page, "The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick" (1999) 67 Antitrust L.J. 1). The author essentially concludes that indirect purchaser litigation for price-fixed goods is not a viable method of achieving behaviour modification against anti-competitive behaviour. At pp. 36-37 the author states:
>
> > Thus, only a highly artificial subset of indirect purchasers of price-fixed goods will ever be compensated by class actions. Moreover the denial of certification is largely unrelated to the merits of the underlying claim. Most of the factors that preclude certification of classes of indirect purchasers have little to do with whether a price-fixing conspiracy actually existed or whether indirect purchasers bore an overcharge. The number of levels of intermediate purchasers between the price fixers and plaintiff class is unrelated to the success of the conspiracy. Similarly, whether plaintiff intermediate purchasers alter or add value to the product, or use it as an ingredient in another product, has nothing to do with whether price-fixing has occurred upstream, or even whether the overcharge was passed on. Yet these factors may preclude

> certification because they make it impossible to establish harm to each class member by any kind of common proof.
>
> Thus, in many cases, a price-fixing overcharge will simply dissolve into the currents of the channels of distribution. Eighty years ago, Justice Holmes noted the "endlessness and futility of the effort to follow every transaction to its ultimate result," even though "in the end the public pays the damages in most cases of compensated torts." Now, as then, it may well be that an overcharge is passed on but the legal system cannot identify its incidence. Common proof is impossible and individualized proof would be more costly than the amount of the harm. The emerging reality of the indirect purchaser class action offers no realistic mechanism for accomplishing compensation for remote purchasers of price-fixed goods. If the indirect purchaser class action is only available to a small subset of indirect purchaser injuries, even among price-fixing conspiracies that are actually detected, it is not fulfilling its stated purpose.

[61] In *Price v. Panasonic Canada Inc.*, [2002] O.J. No. 2362 (S.C.J.), the plaintiffs alleged that over a period of 19 years, the defendants maintained the re-sale price of various audio-visual products, contrary to Canada's competition laws. In that case, the number of plaintiffs and the variable nature of the individual claims of indirect purchasers meant that the assessment of damage could not be a common issue. As a result, certification was refused. Justice Shaughnessy noted the following on this issue:

> **47** The allocation of damage is not as the Plaintiffs would suggest, a common issue in this action. The specific entitlement of each class member to damages is an inherently individual issue requiring each class member to establish the amount of loss or damage sustained within the exceptions and parameters detailed above.
>
> **48** I find that allowing a class action in the circumstances of this proceeding would not serve the interests of access to justice, or achieve the goal of judicial economy. In Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453 at 472, judicial economy was defined as "resolving a large number of disputes in which there are common issues of fact or law within a single proceeding, avoiding inconsistent results and preventing the court's resources from being overwhelmed by a multiplicity of proceedings." The proposed class action, in my opinion, would be unmanageable. The proceedings would be subsumed by the multitude of individual issues which would necessitate individual trials for each class member. In *Chadha v. Bayer*, Somers J. stated (paragraph 37) that manageability has "to be assessed in the context of the entire action, not just the common issue trial." This proceeding mirrors the Chadha case in that it too would become a "monster of complexity" for the class members, the defendant and the Court. This action would also "inevitably break down into a long series of individual trials, dealing with many complex issues and many parties ... Any potential judicial efficiency [and access to justice] [would] be lost through this process." An adjudication of the

> common issue (breach of statute or commission of the tort) in the plaintiffs' favour would not materially improve the position of the members of the proposed class in resolving their individual claims. It would not significantly move their litigation forward.

[62] In addition, Shaughnessy J. emphasized that protracted proceedings involving large numbers of individual claims would not achieve the other objectives of class proceedings, namely behaviour modification or fairly advancing members' claims:

> **49** The Plaintiffs' counsel also submits that certification of the present action would serve the goal of behaviour modification. Indeed, at paragraph 69 of their factum, the Plaintiffs state that the primary object served by the certification of this class proceeding is "behaviour modification". However, there is a specialized statutory authority, namely, the Competition Bureau that is responsible for the administration and enforcement of the provisions of the Competition Act and the Combines Investigation Act, which were allegedly violated in this case. The authorities on this point indicate that behavioural modification may be relevant to determining whether a class action should proceed. The existence of statutory regulations certainly does not foreclose the possibility of an antitrust class action. However, such statutory agencies with their authority to monitor and prosecute, does go along way toward addressing legitimate concerns about behaviour modification. (*Hollick v. Toronto (City)* paragraph 35). I am not satisfied that behaviour modification is a significant concern in this case. Behaviour modification is better suited to the process of the Competition Bureau which can investigate and prosecute offenders. The goal of behaviour modification, in any event, "suffers where lengthy individual proceedings involving each class member has to be undertaken." (*Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 at 222).
>
> **50** In summary, I find it impossible to conceive how a class proceeding would advance the members claims fairly, efficiently or manageably through the court process. Judicial economy would not be achieved and the ability of class members to attain access to justice through such a procedure is highly questionable. The goal of behaviour modification is better achieved through the statutory regulations in place relating to antitrust violations.

[63] In *Harmegnies v. Toyota Canada*, [2007] J.Q. No. 1072 (S.C.), the plaintiff alleged that Toyota Canada and 38 dealers in the Montreal area conspired to restrict competition and increase the price of their vehicles. The plaintiff thus sought authorization to institute a class action to obtain compensation for the loss sustained. Poulin J.C.S. refused stating at para. 44 [Unofficial English Translation]:

> 44 The Court is of the view that, if authorization were to be granted, for each of the 37,000 members concerned, it would be required to examine and weigh all the

> evidence submitted on a case-by-case basis, including but not limited to, each person's ability to negotiate or his lack of interest or aptitude to engage in such an exercise, the inclusion in the price of accessories, warranties, options, services, trade-ins, credit costs, etc. In short, too many subjective factors tend to individual each class member's situation.

[64] As is evident from these decisions, there are considerable impediments to certification in price-fixing cases involving indirect purchasers. Simply put, given their number, they must demonstrate a methodology to establish damages on a class wide basis and avoid individual inquiries in order to succeed.

[65] No analysis would be complete without a discussion of the recent Court of Appeal decisions in *Markson, supra,* and *Cassan, supra.* Neither of these cases were price-fixing conspiracies but some have argued that they represent a sea change in the approach motions judges should take to certification. Several decisions made following these two will then be reviewed.

[66] In *Markson, supra,* the Court of Appeal considered a decision of the Divisional Court, which had upheld the motions judge's refusal to certify. The plaintiffs alleged that the defendant received interest on cash advances in violation of s. 347(1)(b) of the *Criminal Code*. They had sought to certify a class proceeding for: (1) a declaration that the defendants had violated the *Criminal Code*; (2) injunctive relief; (3) damages for breach of contract; (4) restitution for the amounts received by the defendant in excess of the permissible interest rate; and (5) punitive damages.

[67] The difficulty for the plaintiff was that the criminal rate of interest would only result if the individual cardholder engaged in a series of fairly specific and unusual borrowing and repayment transactions. The evidence was that the vast majority of cardholders would never have done so and therefore would not have suffered any loss, raising an issue, therefore, about whether damages could be proven on a class-wide basis. Further, the maximum loss that could have been suffered on any particular transaction was $7.50.

[68] The motions judge refused to certify the proceeding on the basis that the restitution and breach of contract claims did not raise common issues and because a class proceeding was not seen as the preferable procedure with respect to the balance of the claims. The motions judge

held that because the class action would require the bank to review approximately eight million transactions in order to determine if any class member had suffered a loss, it would be unmanageable. In other words, the class action would be dominated by many individual, rather than common issues. Further, the cost of determining liability would out-strip any potential recovery. A majority of the Divisional Court upheld his decision.

[69] On appeal to the Court of Appeal, the plaintiff submitted for the first time that ss. 23 and 24 of the *CPA* offer a solution to the common issues problem with the restitution and breach of contract claims. The Court of Appeal reasoned that s. 24 could provide a mechanism by which to calculate damages that otherwise would have to determined on a case-by-case basis. Section 24(1) has been reproduced above at para. 31.

[70] The court had this to say:

> **41** If the common issues relating to the application for a declaration and injunctive relief were to be determined in the plaintiff's favour, the trial court will have found that the defendant received interest in excess of an effective annual rate of 60% on cash advances. Thus, liability to some class members will have been established. At least some members of the class would therefore be entitled to a remedy, either by way of restitution or damages for breach of contract. In my view, those two findings – liability and entitlement to a remedy – are sufficient to trigger the application of ss. 23 and 24.
>
> **44** The difficult issue in this case is whether s. 24 can apply where, as here, it is alleged that whether or not an individual was affected by a breach of contract or violation of the *Criminal Code* can only be done on a case-by-case basis. This depends on an interpretation of s. 24(1). Section 24 has received relatively little attention in the reported cases: see e.g. *Serhan Estate v. Johnson & Johnson* (2006), 269 D.L.R. (4th) 279 at paras. 136-39 (Div. Ct.). However, I agree with Cullity J. in *Vezina v. Loblaw Companies Ltd.*, [2005] O.J. No. 1974 at para. 25 (S.C.J.) that at the certification stage the plaintiff need only establish that "there is a reasonable likelihood that the preconditions in section 24(1) of the CPA would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues."

[71] The court was satisfied that ss. 24(1)(a) and (c) were easily met. The issue was the interpretation of s. 24(1)(b). Rosenberg J.A. observed at para. 48:

> **48** Section 24(3) provides, in part, that, "In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award". The subsection therefore contemplates that an aggregate award will be appropriate notwithstanding that identifying the individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis, which may be impractical or inefficient. Condition (b) must be interpreted accordingly. In my view, condition (b) is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments. Or, in the words of s. 24(1)(b), where the only questions of fact or law that remain to be determined concern assessment of monetary relief. [Emphasis added.]

[72] In reconciling this decision with that in *Chadha*, Rosenberg J.A. stated at para. 55:

> **55** Nor does this application of the *CPA* offend this court's holding in *Chadha, supra* or *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641, leave to appeal refused [2006] S.C.C.A. No. 1. In *Chadha*, the plaintiff adduced no evidence that the result of the defendants' allegedly illegal acts were passed through to the consumers who made up the proposed class. That is not an issue in this case. There is no question that the allegedly illegal fees were passed on to the class members and received by the defendant. The only serious issue is how many members of the class actually suffered an economic loss. This issue can be addressed by ss. 23 and 24.

[73] Similarly, in *Cassano v. Toronto-Dominion Bank*, [2007] O.J. No. 4406 (C.A.), the Court of Appeal granted certification. The plaintiff claimed that TD breached its contract with the holders of its Visa credit cards when it charged undisclosed and unauthorized fees on foreign currency transactions. The motions judge dismissed the motion to certify on the grounds that certification would only be appropriate if damages could be determined on a class-wide basis. Because they could not, the common issues requirement under s. 5(1)(c) was not met. The Divisional Court upheld the motions judge.

[74] In granting certification, Winkler C.J.O. for the court emphasized that at issue was the aggregate of TD's liability, which could be reasonably be established by examining its records of fee income collected during the relevant time period.

[75] Having concluded that ss. 24(1)(a) and (c) were satisfied, Winkler C.J.O. adopted the reasoning in *Markson* and stated at para. 47:

> **47** Condition (b) remains to be considered. In *Markson*, Rosenberg J.A. concluded that this condition is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments. In the present case, if a finding were made that there had been a breach of contract in relation to the charging of the fees, there would be no "questions of fact or law other than those relating to the assessment of monetary relief" remaining to be determined. The finding that there had been a breach of contract would make all such fees improper. Accordingly, the only assessment necessary would be to quantify the amount of the fees charged. That falls squarely within the contemplation of 24(1)(b).

[76] The extent of TD's liability could be determined by reviewing TD's records relating to the amount of income it collected from all foreign currency transactions as a result of the undisclosed fees. The court rejected the defendants' argument that the cost of determining quantum – by checking individual records – was too high, totalling close to $50 million. Winkler, C.J.O. made the following observation:

> **49** The economic argument advanced by TD ignores the fact that the damages calculation would only be necessary if TD is found to have breached the contract with its cardholders. Therefore, the essence of TD's argument is that the recovery phase of the litigation, subsequent to a finding of liability, will cause it to incur significant expense. It would hardly be sound policy to permit a defendant to retain a gain made from a breach of contract because the defendant estimates its costs of calculating the amount of the gain to be substantial. A principle purpose of the *CPA* is to facilitate recovery by plaintiffs in circumstances where otherwise meritorious claims are not economically viable to pursue. To give any effect to the economic argument advanced by TD here would be to pervert the policy underpinning the statute.

[77] The court also found that the provisions of the *CPA* might permit the trial judge to fashion a remedial order that would avoid the potential costs and inefficiencies associated with determining the quantum of damages on an individual basis, or authorize the court to require class members to submit individual claims in order to give effect to an aggregate award of damages.

[78] Emphasizing the flexibility of the *CPA*, Winkler C.J.O. stated at paras. 62-63:

> **62** What is sometimes overlooked in the focus on the common issues at the certification stage is that the *CPA* includes provisions permitting the use of modified procedures for conducting individual assessments of damages. The thrust of these provisions is to ensure that the court has the means to conduct cost-effective and timely determinations of individual issues following the common issues trial. As a result, the fact that damages may not be amenable to aggregate assessment at the conclusion of a common issues trial is not fatal to certification of a class proceeding.

> **63** Indeed, the resolution of individual issues is an essential element of many class proceedings and is crucial if there is to be an advancement of the goal of access to justice. Put another way, although the prospect of an aggregate assessment of damages is a factor in favour of certification, it is not a prerequisite. An action may well be certified as a class proceeding even in cases where individual assessments of damages in small amounts may be necessary. Absent this possibility, the purposes of the *CPA* would be seriously eroded.

[79] I turn then to four price-fixing cases decided post *Markson* and *Cassano.* In *Axiom Plastics Inc. v. E.I. DuPont Canada Co.*, [2008] O.J. No. 1973 (Div. Ct.), the Divisional Court upheld the certification of the action for a class of direct purchasers but not indirect purchasers. The plaintiff alleged that the defendant unlawfully fixed the prices of engineering resins it provided for use in automotive parts, with the assistance of certain parts manufacturers.

[80] The appellant-defendant had argued that the plaintiff did not lead the evidence suggested by the Court of Appeal in *Chadha* to be necessary to establish that loss and liability would be proven on a class-wide basis. Further, it was argued that the motions judge made incorrect assumptions about certain basic economic principles. The Divisional Court rejected the appellant's arguments and confirmed that *Chadha* dealt with indirect purchasers for whom the proof of damages would necessarily be individual rather than aggregate. Because this case involved an identifiable class of direct purchasers, certification was wholly reasonable. Kiteley J. at paras. 51-54 had this to say:

> **51** In her analysis, the motion judge correctly identified the issue. She considered the authorities on which counsel for DuPont had relied. She noted DuPont's submission that *Chadha* established a "standard of evidence" that was required to establish loss as a common issue in a price-fixing case and that Axiom had fallen short. She also noted DuPont's argument that Professor Hughes challenged Ms. Sanderson's opinion that damages could be calculated on a class-wide basis.

> **52** The motion judge identified the distinguishing features of *Chadha*. I am not persuaded that *Chadha* establishes the "standard of evidence" required in a motion for certification such as this where the class includes a discrete and readily identifiable number of direct purchasers from a small group of identified distributors.
>
> **53** The motion judge analyzed the expert evidence with care. She noted what the experts said or did not say and the criticism by the expert on behalf of the defendant. She considered the opinion evidence of Ms. Sanderson as to the methodologies by which loss could be calculated. She was alive to the authorities to which counsel also referred in this motion for leave. She made key findings in the analysis and conclusion section.
>
> **54** The *decision* is clearly not in conflict but the *reasoning* of the motion judge is different from the reasoning of the Court of Appeal in *Chadha*.

[81] In *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [2008] B.C.J. No. 831 (S.C.), currently under reserve at the B.C.C.A., the plaintiff sought to certify of an action alleging that the defendants engaged in an international price-fixing conspiracy for the sale of computer memory. The defendant had been convicted in the U.S. of price-fixing. The proposed class included indirect and direct purchasers, and the plaintiffs pleaded conspiracy, interference with economic interests, unjust enrichment, waiver of tort and constructive trust. The defendant argued that the scope of the proposed class was simply too large and the complexity involved in identifying individual claims and the pass-through analysis was fatal to the motion.

[82] Certification was denied. In considering pass-through damages of individuals as a potentially common issue, Masuhara J. stated at para. 139:

> **139** In a case such as this where the context is pass through, the court must be persuaded that there is sufficient evidence of the existence of a viable and workable methodology that is capable of relating harm to Class Members. This is not an application such as in *Vitapharm* where a settlement has been effected such that the threshold assessment can be "relaxed somewhat": see *Furlan v. Shell Oil Co.*, [2002] B.C.J. No. 2549, 2002 BCSC 1577 at para. 11. Given the inherent complexities, the scrutiny cannot be superficial. The evidence must establish that the proposed methodology has been developed with some rigour and will be sufficiently robust to accomplish the stated task. Dr. Ross' own materials confirm this. His evidence referenced an article for the benefit of the court, authored by B. Ray and S. Schwartz of NERA, a recognized economic consulting firm, which states:
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> > To be sure, any analysis of the amount of a pass-through that is attributable to an illegal monopoly overcharge will likely be complex

> and time-consuming. But, in order to present an analysis that will stand up to close scrutiny -- from either a plaintiff's or defendant's perspective -- the analysis must be done rigorously, with the application of the appropriate empirical techniques and relevant economic theory. To assume that a pass-through analysis can be completed without such rigorous economic and statistical analysis is naive.

[83] Masuhara J. also distinguished *Markson*. While *Markson* allows for aggregation provisions to be used, he noted that liability must first be established. The inability to prove damage or harm – that is to establish liability – precluded the application of the B. C. equivalent of s. 24. As stated at para. 170:

> **170** I do not accept the plaintiff's submission on this point and agree with the submissions of the defence. While the court in ***Markson*** found that the aggregation provisions could be invoked, the decision recognized that the aggregation provisions could not properly be used to establish liability where it could not otherwise be established.

[84] Masuhara J. compared the case before him to *Chadha*. He concluded that the plaintiffs must first demonstrate harm to constitute a class. He then concluded that the after-the-fact proof of pass-through would lead to an unmanageable class proceeding:

> **172** The instant case is analogous to *Chadha*, it is a price-fixing/pass through case. As such, it is unlike *Markson* and *Cassano*, which relate to credit card contracts between the class member and the defendant with no intermediary. As in *Chadha*, there is in this case a "serious issue" -- indeed, it is the main issue -- as to whether "the result of the defendants' ... illegal acts were passed through to the consumers who ma[k]e up the proposed class." As in *Chadha*, the plaintiff cannot circumvent the need to prove harm on a class wide basis by resorting to the aggregation provisions of the *Act*, which would be available *only* after such a pass through was already established on a class-wide basis.
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> ...
>
> **176** In my view, *Chadha* remains good law in precluding the plaintiff from resorting to the aggregation provisions of the Act to establish liability when there is otherwise no basis to do so, and I follow it. In this case, liability requires that a pass-through reached the Class Members. That question requires an answer before the aggregation provisions, which are only a tool to assist in the distribution of damages, can be invoked.

[85] As a result, class proceedings were not the preferable procedure for indirect purchasers and certification was denied. As already noted, a decision of the British Columbia Court of Appeal is under reserve. I expect that one of the court's considerations will be whether the

import of *Markson* was misapprehended, bearing in mind that *Markson* spoke of the need to establish potential liability on a class-wide basis. It is possible that there will be a discussion as well about whether it is necessary at the certification stage to prove class-wide damages, as opposed to a methodology to do so.

[86] In *Steele v. Toyota Canada Inc.*, [2008] B.C.J. No. 1496 (S.C.), a motion for certification was dismissed. The plaintiffs were B.C. residents who had purchased Toyota automobiles through an access program that involved sales and pricing corresponding to the sale and lease of Toyota vehicles. The plaintiffs claimed the access program was anti-competitive. In concluding that class proceedings were not the appropriate vehicle (no pun intended) Ehrcke J. noted that because the claims were not based in contract as in *Markson*, the plaintiffs were required to demonstrate actual loss to prove liability. Failure to do would preclude certification:

> **101** As discussed above, I have concluded that the defendants are correct in their submission that in order to establish liability for each of the identified causes of action, the plaintiffs must prove that the defendants' conduct caused actual loss, damage or deprivation to the class members. As the claims here are not based on contract, proof of actual loss or deprivation is essential to proving liability; it is not merely a question of the quantification or assessment of damages.

[87] It was further stated that if liability cannot be established on a class-wide basis, the proof of individual loss would simply be too broad and would render a class proceeding unworkable. As such, a class proceeding was not the appropriate way to proceed.

[88] Finally, in the recent *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.), the Divisional Court considered an appeal from Perell J.'s refusal to certify ([2008] O.J. No. 833 (S.C.J.)). The plaintiffs, two numbered companies, had brought claims for general and punitive damages and an injunction against the defendant, alleging breach of the *Competition Act*, breach of contract and breach of duty of fair dealing under Ontario franchise legislation and conspiracy to fix prices.

[89] At the certification motion, Perrell J. determined that there were no common issues for certification because the plaintiffs had not established that damages could be determined on a class-wide basis.

[90] The majority of the Divisional Court allowed the appeal and conditionally certified the action, subject to the provision of an amended litigation plan to be approved by the motions judge. In clarifying the scope of the common issues requirement of certification at s. 5(1)(c), the Court stressed the importance of judicial efficiency:

> **31** The common issues requirement is a "low bar". Common issues need not determine liability. They may make up a very limited aspect of the liability. They need only be issues of fact or law which will move the litigation forward and avoid duplication. Many individual issues, including damages, may remain to be decided after the resolution of a common issues trial: *Hollick, supra* at paras. 16, 18, 25; *Carom v. Bre-X Minerals Ltd.*, (2000) 51 O.R. (3d) 236 (C.A.), leave to appeal denied, [2000] S.C.C.A. No. 660 at paras. 40-41; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at para. 52, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50 [*Cloud*].
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> **32** In *Cloud*, Goudge J.A. underscored the importance of recognizing that certain issues could meet the common issues threshold, notwithstanding the fact that other significant individual issues may remain outstanding. He stated at para. 53:
>
> > In other words, an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1) (c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1) (c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial.
>
> And at para 65, (citing the Supreme Court in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184): " ... the comparative extent of individual issues is not a consideration in the commonality inquiry although it is obviously a factor in the preferability assessment."

[91] As a result, the court concluded that the motions judge erred in finding that there were no common issues. The Divisional Court considered that the motions judge erroneously focused on proof of damages and failed to identify and consider whether other common issues existed that would permit certification. In particular, it was noted that the inability to prove damages on a class-wide basis is not a bar to certification pursuant to s. 6 of the *CPA*.

[92] The court proceeded to identify a number of possible common issues. In addition, the majority also found that s. 24(1) of the *CPA* was available to support certification. Because liability could be founded through the majority's re-assessment of common issues, s. 24 could properly be invoked.

[93] There is, however, an important dissent from Swinton J. who held that the motions judge properly canvassed the common issues and that certification was correctly denied. Emphasizing that Perell J.'s reasoning was consistent with *Chadha*, Swinton J. stated:

> **169** For damages to be a common issue, the appellants had to show there was a basis in fact showing damages or loss from the alleged price maintenance or conspiracy was class wide. This required them to show they had a methodology to prove, on a class wide basis, that the actual prices for supplies paid by franchisees, as a group, exceeded the price they would have paid for those products in the absence of the alleged price maintenance and conspiracy (the "but for" prices).
>
> **184** The motions judge made no error in his treatment of ss. 23 and 24 of the CPA. He correctly found that s. 23 "does not render otherwise inadmissible statistical evidence admissible for other purposes, such as determining liability" (Reasons at para. 120). Section 23 does not permit a defendant's liability to be based on statistical probabilities or percentages. It cannot be used to alter the constituent elements of any cause of action. In this case, actual damage is a component of liability for both the CA and the conspiracy claims.
>
> **185** Nor did the motions judge err in finding s. 24 of the CPA to be of no assistance. It provides a method for the "assessment of monetary relief" in order to establish the amount of the defendant's monetary liability - but only when there are no other questions of fact or law remaining. It is a provision for assessing the quantum of damages on a global or aggregate basis, but not the fact of damage (*Chadha, supra* at para. 49). Again, it cannot assist the appellants with respect to any of its claims. As I explain further below, even the determination that there is a breach of contract requires some individual determinations with respect to what are commercially reasonable prices.
>
> **186** This is not a case like *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.), where the Court held that s.24(1) can be used where "potential liability can be established on a class-wide basis" (at para. 48). Here, the motions judge found that the appellants had not shown that potential liability could be proved on a class wide basis (Reasons, para. 121). Therefore, s. 24(1) was not available to assist them in showing that there was a common issue.
>
> **187** In conclusion, therefore, the motions judge made no error in law or fact by concluding that damages or loss was not a common issue.

[94] Leave to appeal from the Divisional Court has been granted by the Court of Appeal.

[95] With that background, I turn then to an analysis of each of the criteria for certification set out in s. 5 of the *CPA*.

1. Is a cause of action disclosed?

[96] The parties agree that the test to be applied in assessing whether a cause of action exists is the "plain and obvious" test governing motions to strike pleadings pursuant to Rule 21 of the *Rules of Civil Procedure: Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959; *Kumar v. Mutual Life Assurance Co. of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.).

[97] The plaintiffs have pleaded three causes of action, namely a tortious conspiracy at common law; a conspiracy contrary to s. 45 of the *Competition Act* giving rise to a civil remedy; and intentional interference with class members' economic interests. However, the last cause of action is not being pursued.

[98] The defendants do not suggest that the causes of action have not been adequately pleaded. They submit, however, that both common law and statutory conspiracy claims require proof of individual loss or damage. This renders the claim unsuitable for class treatment in the result. This submission will be analyzed below.

[99] In the meantime, I am satisfied that the pleadings disclose causes of action and that the constituent elements of each cause of action have been adequately pleaded.

2. Identifiable Class

[100] The plaintiffs propose a class that includes both direct and indirect purchasers of hydrogen peroxide, as follows:

> All persons in Canada (excluding the defendants and their subsidiaries, affiliates and predecessors) who purchased hydrogen peroxide, products containing hydrogen peroxide, or products produced using hydrogen peroxide in Canada between January 1, 1994 and January 5, 2005.

[101] The three purposes of a class definition are said to be:

1. to identify persons who have a potential claim for relief against the defendants;

2. to define the parameters of the lawsuit in order to identify those who are bound by the result;

3. to describe who is entitled to notice of certification.

[102] See *Bywater v. Toronto Transit Commission, supra, Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534. The class definition should not be overly broad or include persons who have no claim against the defendants. On the other hand, it must not be defined so narrowly that it arbitrarily excludes persons with claims similar to those asserted by class members: *Hollick, supra.* It should not be based on the merits of the claim.

[103] As I have already noted, each of the defendants sold hydrogen peroxide to approximately 36 direct purchasers during the class period. Consequently, there seems little question that the direct purchasers are readily identifiable.

[104] The defendants submit that the proposed class definition is overly broad including as it may virtually all individuals and businesses in Canada. They argue that the plaintiffs have led no evidence to show that all proposed class members have suffered damage. In particular, because there is no evidence that a portion of the "supra competitive" price was inflicted on every level of every distribution channel, such a broad definition cannot stand.

[105] In my view, it is no response to the plaintiffs' proposed class definition that because it is so large, it is unsuitable. If that were so, defendants engaged in "bad behaviour" affecting large numbers of the population could do so with relative impunity, knowing that class proceedings were not available and individuals affected would be most unlikely to bring an individual action. This seems a result to be avoided, consistent with Justice Winkler's remarks in *Cassano, supra.* Furthermore, as I read *Markson, supra,* it is not necessary to show that every member of the class suffered damage because Justice Rosenberg said that "the only serious issue is how many members of the class actually suffered an economic loss." This suggests to me that some class members may have suffered no loss.

[106] I am satisfied that the proposed definition meets the test for an identifiable class.

3. Common Issues

[107] The plaintiffs postulate the following as common issues:

(i) Are the defendants, or some of them, liable for conspiracy to fix prices for hydrogen peroxide?

(ii) Did the defendants, or some of them, breach Part VI of the *Competition Act* giving rise to liability pursuant to s. 36 of the *Competition Act.*

(iii) Over what period of time did the conspiracy take place?

(iv) Over what period of time did the conspiracy affect the price of hydrogen peroxide?

(v) Did the defendants take affirmative and/or fraudulent steps to conceal the conspiracy?

(vi) Can damages be measured on an aggregate, class-wide basis and if so, what are the aggregate damages?

(vii) Was the conduct of the defendants, or any of them, such that they ought to pay global exemplary or punitive damages to the plaintiff and class members?

(viii) Should the full costs of investigation in connection with this matter, including the cost of the proceeding or part thereof, be fixed or assessed on a global basis pursuant to section 36 of the *Competition Act* and if so, in what amount?

[108] The plaintiffs submit that the proposed common issue (i) can be further broken down to reflect the constituent elements of tortious conspiracy as outlined by the Supreme Court of Canada in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*:

(i) Are the defendants, or some of them, liable for conspiracy to fix prices for hydrogen peroxide?

(a) Did the defendants unlawfully conspire with each other to limit or lessen, unduly, the production of hydrogen peroxide, *or* to enhance unreasonably the price of hydrogen peroxide?

(b) Was the defendants' unlawful conduct directed towards the plaintiffs and other class members?

(c) Did the defendants know, or ought to have known, in the circumstances that injury to the plaintiffs and other class members was likely result?

(d) Did the plaintiffs and other class members suffer injury?

[109] Finally, the plaintiffs say that the proposed common issue (ii) can be further broken down to reflect the constituent elements of sections 45 and 36 of the *Competition Act*:

(ii) Did the defendants, or some of them, breach Part VI of the *Competition Act* giving rise to liability pursuant to s. 36 of the *Competition Act*.

(a) Did the defendants conspire with each other to limit or lessen, unduly, the production of hydrogen peroxide, *or* to enhance unreasonably the price of hydrogen peroxide?

(b) Did the plaintiffs and other class members suffer injury?

[110] The term common issue is defined in the *CPA* as common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts: *Vitapharm Canada Ltd., supra.*

[111] The question of commonality should be approached purposively. The underlying question is whether certifying a class would avoid the duplication of fact finding or legal analysis. The focus is whether "there are any issues the resolution of which would be necessary to resolve each member's claim and which could be said to be a substantial ingredient of those claims": *Western Canadian Shopping Centres, supra,* and *Cloud, supra.*

[112] The defendants submit that the admittedly common questions about whether the defendants engaged in the alleged conspiracy and whether it enabled them to raise the price at which hydrogen peroxide was sold to direct purchasers do not satisfy the common issues test. This is so because the plaintiffs are unable to establish injury and liability on a class wide basis. As a result, it is said that any determination whether the defendants conspired will not meaningfully advance the litigation.

[113] I start the analysis by reiterating and adopting the following words of Cumming J. in *Vitapharm Canada Ltd, supra:* "Putative class members have a common interest in any proof

of a concerted action, conspiracy, and of agreement with the aim and result of restricting trade." I would reiterate, as well, that *Markson* is authority for the proposition that it is not necessary to establish that every member of the class suffered a loss.

[114] To my mind, a determination of the proposed common issues (i) (a - c), (ii) (a), (iii), (iv), (v) and (vii) – the existence and scope of the conspiracy – can be made without any reference to individual class members and would significantly advance the litigation.

[115] The real question is whether there is sufficient evidence in the record to support the plaintiffs' contention that proposed common issues (i) (d), (ii) (b), (vi) and (viii) – the fact of harm and aggregate damages – are appropriate and viable common issues.

[116] At the heart of the debate is whether the decision in *Chadha* has been overtaken by the recent Court of Appeal decisions in *Markson and Cassano, supra.* The plaintiffs submit that it has. In particular, they argue that the evidentiary threshold established in *Chadha* is unrealistic in an environment of no pre-certification discovery and that *Markson* signals a relaxation of the threshold.

[117] On the other hand, the defendants submit that *Chadha* remains good law and indeed has been consistently followed in Ontario and elsewhere, for example, in British Columbia in *Pro-Sys Consultants Ltd., supra,* being one such example.

[118] I am of the view that *Markson* and *Cassano* signal a different approach to be taken to certification whether it be in breach of contract or other types of cases. Justice Rosenberg spoke of the need to establish "potential liability" before resort to the aggregation provisions could be had. That being so, it seems to me that the plaintiffs here need only prove potential liability – in other words, that the defendants acted unlawfully. This would trigger the aggregate assessment provisions. Further, *Markson* establishes that not every class member need have suffered a loss and so it is not necessary to show damages on a class-wide basis.

[119] It is necessary to next examine the evidence of Drs. Beyer and Schwindt. Before doing so, however, it bears remembering that it is not necessary to reconcile the conflicting opinions at this stage of the proceeding. Indeed, it has been said that at the certification motion,

"the court is ill-equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis, in fact, for the certification requirement in issue": *Hague v. Liberty Mutual Insurance Co.,* [2004] O.J. No. 3057 (S.C.J.); *Cloud, supra.*

[120] The plaintiffs have retained Dr. John Beyer of Nathan Associates Inc. to provide an opinion with respect to damages in this case. Dr. Beyer has studied the pulp and paper industry for more than 30 years and is said to have specialized knowledge of the industry. He has been an expert in several price-fixing conspiracy cases in the pulp and paper industry: *Corrugated Cardboard Antitrust Litigation; Liner Board Antitrust Litigation*; *LaCie McCormack Canada Co. v. Stone Container Corp.;* and *In Re: Hydrogen Peroxide Antitrust Litigation*, the parallel American proceeding to this.

[121] Dr. Beyer has provided an opinion that "the alleged joint conduct would have impacted members of the proposed class by raising the prices of hydrogen peroxide and of products containing or produced using hydrogen peroxide, higher than they would have been absent the alleged wrongdoing." In this report, Dr. Beyer considered a number of market conditions, including:

- supply substitution among producers;
- the defendants' joint market power due to industry concentration;
- barriers to *de novo* entry;
- the nature of demand for hydrogen peroxide;
- industry wide price increase announcements

[122] Dr. Beyer concludes as follows:

> The commodity-like nature of hydrogen peroxide sold by the defendants and the presence of supply substitution imply that price is the key factor in a purchaser's decision to choose one hydrogen peroxide supplier over another. These factors establish that, in the absence of a conspiracy to fix prices, restrict output or allocate customers, price competition should have prevailed across all products for members of the proposed class. Defendants' market power – due to industry concentration, high barriers to

> *de novo* entry, and the inelastic nature of demand with respect to price – also establishes that class members would have been limited in their ability to circumvent the impact of alleged joint conduct on hydrogen peroxide prices.
>
> Review of the defendants' price increase announcements reveals that defendants generally intended for the price increases to apply to all direct purchasers and to a broad range of products. This characteristic of the price increase announcements reinforces the conclusion that defendants intended their price increases to have a generalized effect on all hydrogen peroxide purchases. Thus, the alleged conspiracy to fix the prices in the hydrogen peroxide market would have had a common impact across direct purchaser members of the proposed class.

[123] Dr. Beyer also analysed the market characteristics of three of hydrogen peroxide's key downstream industries in Canada – pulp and paper products, mining and water supplies – to determine whether the conspiracy would have impacted purchasers of hydrogen peroxide products or products produced using hydrogen peroxide, in other words, the indirect purchasers. On a preliminary basis, Dr. Beyer came to the conclusion that:

> Based on the information currently available to me, I conclude that the alleged conspiracy would have impacted some indirect purchasers of the proposed class – some independent paper producers and purchasers of residential water supplies – by raising the price of pulp or water containing or produced using hydrogen peroxide above what would have prevailed absent the alleged joint conduct.

[124] Dr. Beyer has sworn that there are feasible methods for calculating damages on a class wide basis, including estimating the degree to which any impact of the alleged joint conduct was passed through to purchasers of downstream products. Dr. Beyer details the methodology to be utilized in determining class wide damages and the appropriate apportionment of aggregate damages between direct and indirect purchasers.

[125] Dr. Beyer proposes to determine aggregate damages by first estimating the "but for" price using a benchmark price unaffected by the alleged conspiracy and then by using what is called a multiple regression analysis to control for factors affecting the price of hydrogen peroxide other than conspiracy. Dr. Beyer has stated that a multiple regression analysis has been widely accepted and applied in the context of the litigation of antitrust cases. I assume that he is referring to his experience in the American litigation.

[126] Dr. Beyer has also said that the necessary data exists to estimate aggregate damages and to calculate the pass through of any overcharge in at least the pulp and paper and water treatment sectors, which account for more than 92% of hydrogen peroxide consumption in Canada. He states:

> Damages can be estimated using a combination of publicly available data and the Defendants' electronic transaction and cost data for hydrogen peroxide. It is expected that the Defendants' electronic data will contain actual transaction prices that can be used to construct the dependent variable. If necessary, it may be possible to mitigate incomplete data from an individual defendant over a subset of the Relevant Period by constructing a single analysis across all Defendants. An alternative approach would be to use non-Defendant data for hydrogen peroxide prices spanning the appropriate time period. Other sources of hydrogen peroxide price data include Plaintiffs and governmental sources. Plaintiffs IPP and IPL and purchaser Catalyst Paper provided electronic transaction data as described in ¶2 (see Chart 8). Statistics Canada produced a monthly hydrogen peroxide producer price index series for the period from January 1986 to August 1997 (Chart 9). It also publishes import data sufficient to compute average monthly import values spanning the Relevant Period as well as potential benchmarks preceding and following the Relevant Period.

[127] Dr. Beyer also describes what other data would be required to perform the proposed regression analysis. Those sources include the defendants' transaction data and, of course, the settling defendants will produce this data pursuant to the settlement agreements by the terms of which they agree to provide cooperation, as well as Statistics Canada, the U.S. Bureau of Labour Statistics Producer Price Indexes, purchasing.com and industry publications.

[128] Dr. Schwindt, who is the defence expert, is of the view that Dr. Beyer's analysis of whether the alleged conspiracy would have impacted prices is flawed.

[129] Dr. Schwindt challenges Dr. Beyer's assertion that the alleged conspiracy would have had class wide impact on Canadian customers because he based his assertion on an inaccurate understanding of the Canadian hydrogen peroxide market. The alleged errors are said to include the following:

1. Dr. Beyer mistakenly described the product as homogenous, when in reality, the hydrogen peroxide is bundled with transportation, technical services and equipment and as a result is not homogenous;

2. He mistakenly concluded that buyers had little ability to avoid the impact of the alleged conspiracy on prices, when in reality Dupont was a substitute supplier of hydrogen peroxide and there are certain substitute chemicals, albeit the ability to ultilize substitute chemicals or rely on Dupont varied by mill and in the case of chemical substitution, by wood pulp type;

3. He mistakenly relied on the defendants' price increase announcements as evidence of common impact, when the only cogent evidence available is that the price announcements bear no connection with actual prices;

4. He mistakenly ignored buying power when some of the large buyers certainly would have had meaningful degrees of market power, although this varied across customers; and

5. He mistakenly ignored the effects of the long term contracts, when many of the contracts would have constrained the defendants from applying any price increase simultaneously across buyers. The timing of any impact would vary by customer and would have to be determined on an individual basis.

[130] Dr. Schwindt also says that Dr. Beyer failed to propose a method to determine the actual price of hydrogen peroxide, which is the dependent variable in his proposed regression analysis. Dr. Schwindt noted that Dr. Beyer had failed to identify how he would unbundle the different costs associated with the provision of technical services and equipment and the different transportation costs included in the price of hydrogen peroxide.

[131] Dr. Schwindt also believes that Dr. Beyer's proposed method to determine a "but for" price, which is needed to estimate class wide overcharge, is not feasible because Dr. Beyer has not identified a specific date that the alleged conspiracy commenced; and he failed to describe how he would model supply and demand factors, nor has he identified the relevant market.

[132] The defendants submit that it is only after there has been proof of an actual overcharge to all direct purchasers of a product that it is necessary to conduct an analysis to determine if there was any actual pass through of some or all of the overcharged to successive purchasers. Of course, hydrogen peroxide is itself an intermediate product. It is also used to produce other products that are also intermediate products. The intermediate products move through

processing and distribution chains, some with many links until they reach the final consumer. The question is whether and how far a supra-competitive price for hydrogen peroxide would be passed through multiple processing and distribution chains and if they were, could the pass-through be measured?

[133] If it is possible to prove actual pass-through, the defendants submit that there are four possible outcomes at each successive layer of purchasers in each of the various distribution chains for each product. They are:

- no pass-through at all;
- partial pass-through;
- full pass-through; and
- a magnified pass-through where the pass-through actually exceeds the total overcharge to the direct purchaser.

[134] The defendants submit that the plaintiffs have failed to conduct a full pass-through analysis. Rather, Dr. Beyer has illustrated the pass-through for what he considered to be the two major end uses of hydrogen peroxide, namely pulp and paper and water treatment.

[135] Both experts agree that in order to conduct a pass-through analysis, one must consider the elasticity of demand. All else being equal, the more inelastic the demand (i.e. the less sensitive buyers are to price changes) the more profitable it is for a seller to pass on increases in its price to those who purchase from it.

[136] Dr. Beyer cited several empirical studies showing that the demand for paper and paper board are inelastic. Dr. Schwindt agreed that there is a general consensus in the emperical literature that for some price changes, the demand for paper is inelastic. Dr. Schwindt also agreed with Dr. Beyer's statement that some products, including paper "possess market characteristics that would enable suppliers to pass-through anti-competitive increases in the price of hydrogen peroxide".

[137] The experts disagree, however, on whether export sales of pulp and paper are inelastic. Dr. Beyer stated his view in the following way:

> Some pulp and paper manufacturers (like IPP and IPL) were vertically integrated (i.e. they use the pulp and paper they produce to manufacture downstream products). For such vertically integrated firms, if the primary selling market for the downstream products were in the United States, then prices for paper products manufactured in Canada and sold in the United States were determined by the U.S. market and U.S. manufacturers, such as Georgia Pacific, Kimberly Clark and Proctor and Gamble. In this case, the vertically integrated Canadian firm faced perfectly elastic demand and was a price taker. Because the vertically integrated Canadian pulp and paper manufacturer would have been unable to pass through the raw material price increase, it would have borne any artificial increase in the price of hydrogen peroxide.

[138] The defendants submit that this statement is not supported by the evidence of a representative of Irving Paper who was produced for cross-examination. Further, Dr. Schwindt says that Dr. Beyer's view that Canadian pulp and paper exporters could not have passed on cost increases to U.S. purchasers is seriously flawed on two grounds. He says that Dr. Beyer assumed that the alleged conspiracy operated on both sides of the border and if this were true, prices would have increased in both countries. U.S. pulp and paper mills, like their Canadian counterparts, would have faced higher costs and therefore would have had the motivation to pass these on their buyers. Second, Dr. Schwindt believes that Canadian mills are not price takers, simply accepting market prices driven by dominant U.S. producers. Many Canadian mills are owned by U.S. multinationals, many U.S. mills are owned by Canadian multinationals and in several important paper markets, Canadian firms were, in fact, dominant.

[139] Dr. Schwindt says that Dr. Beyer's analysis assumes that the alleged conspiracy would raise the price of hydrogen peroxide only to Canadian pulp and paper producers. The defendants submit that this assumption is not credible for several reasons.

[140] Finally, the defendants state that Dr. Beyer did not consider the diverse and complex distribution chains for the various products made using hydrogen peroxide. As a result, it is impossible to make any class-wide generalizations with respect to pass-through. Dr. Beyer, it is said, proposes to simplify distribution channels and ignore many of the actual steps. The defendants submit that this is unacceptable.

[141] The plaintiffs submit that Dr. Beyer's opinion is well-sourced and supported by significant evidence. They point out that Dr. Schwindt lacks the necessary market understanding to draw the conclusions that he has.

[142] It is probably an understatement to observe that there is little common ground between the two experts. There appears to be a fundamental disagreement on many aspects of the damage analysis, the underlying assumptions, and the methodology.

[143] In analyzing this aspect of the motion, I can do no better than to reiterate the words quoted earlier from the *Hague* decision that at this stage of the proceeding, a court is ill-equipped to resolve competing expert opinions. I understand the defendants' various criticisms of Dr. Beyer's report, but it seems to me that I need only be satisfied that a methodology may exist for the calculation of damages. Dr. Beyers' report attempts to postulate such a methodology. Whether his evidence will be accepted at trial is a completely different issue. It may well be that Dr. Schwindt's various criticisms are well-founded. However, at this stage of the proceedings and on the strength of the evidentiary record as it exists today, I simply am unable to say that Dr. Beyer's opinion will not be accepted by a court. I am also mindful that the parties have not yet had documentary or oral discovery and I think it quite likely that material produced by both the settling and non-settling defendants will be significantly important to the experts in refining their analysis of damages. It is simply not possible at this stage of the proceeding to determine whose opinion is to be preferred.

[144] In addition, there is an issue with respect to whether pass-through will be considered by the trial judge at all or if it is, whether it would impact damages.

[145] With respect to the latter point, the court in *Axiom, supra,* noted that the "possibility that the defence of passing-on might prevail at trial does not mean that there cannot be some basis, in fact, for finding that class members suffered loss." With respect to the former, the plaintiffs wish an opportunity to argue that the passing-on defence is not available to the defendants. They submit that the matter is properly considered in the trial context, based upon a full evidentiary record.

[146] They have provided some Supreme Court of Canada authority which, although they are not price-fixing conspiracy cases, have commented adversely on the passing-on defence.

[147] So, for example, in *British Columbia v. Canadian Forest Products Limited,* [2004] 2 S.C.R. 74 at para. 111, the majority held that the passing on defence did not arise on the facts and it did not specifically address the validity of the defence in Canadian law. Nevertheless, the majority commented that it "is not generally open to a wrongdoer to dispute the existence of a loss on a basis it has been "passed on" by the plaintiff. Such an argument would require the court to engage in 'the endlessness and futility of the effort to follow every transaction to its ultimate result'," the latter a quote from Justice Holms referred to in *Chadha, supra.*

[148] In a dissenting opinion, Lebel J. concluded that the passing-on defence was not a valid defence at law. He expressed concern that to accept the defence in the law of tort would make it more burdensome for plaintiffs to recover. Plaintiffs would not only have to prove damages, but would also have to prove that they did not engage in any other business activity that might offset the loss. Ultimately, the passing-on defence would "result in an argument that no damages are ever recoverable in commercial litigation because anyone who claimed to have suffered damages but was still solvent had obviously found a way to pass the loss on": *British Columbia, supra,* at para. 206.

[149] Similarly, in *King Street Investments Limited v. New Brunswick (Minister of Finance),* [2007] S.C.J. No. 1, Justice Bastarache held that he "would reject the passing-on defence in its entirety." He considered that the defence was economically misconceived and it created serious difficulties with respect to proof. Justice Bastarache agreed with the comments of Lebel J. in the *British Columbia* case regarding the difficulties in a commercial marketplace in proving that losses were not passed on to consumers.

[150] As I have already noted, these decisions were not ones involving allegations of a price-fixing conspiracy. However, it seems to me that the plaintiffs should be given an opportunity to advance their arguments at trial on the basis of a full evidentiary record.

4. Preferable Procedure

[151] The latest word on preferable procedure comes from *Markson, supra,* which had this to say about governing principles:

> 1) The preferability inquiry should be conducted through the lens of the three principle advantages of a class proceeding: judicial economy, access to justice and behaviour modification:
>
> 2) "Preferable" is to be construed broadly and is meant to capture the two ideas of whether a class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and other means of resolving the dispute; and,
>
> 3) The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

[152] Justice Rosenberg went on:

> **70** As I read the cases from the Supreme Court of Canada and appellate and trial courts, these principles do not result in separate inquiries. Rather, the inquiry into the questions of judicial economy, access to justice and behaviour modification can only be answered by considering the context, the other available procedures and, in short, whether a class proceeding is a fair, efficient and manageable method of advancing the claim.
>
> **71** As I have said, the motion judge appears to have accepted that a class proceeding would meet the goals of behaviour modification and access to justice. For the reasons that follow, I agree with that conclusion. The defendant has said that it will continue to conduct business in a manner that may violate the law until presumably the law is changed or it is required to stop by court order. A class proceeding would therefore meet the goal of behaviour modification. While presumably an individual action that resulted in an injunction or declaration would achieve the same result, a class proceeding, unlike an individual action, will also have the advantage of requiring the defendant to account for the economic harm it has caused....
>
> **72** In my view, access to justice overwhelmingly favours a class proceeding. The amounts involved are so small that no litigant would have an interest in pursuing an individual claim. The legal and other fees to pursue the claim would be hugely disproportionate to the amounts in issue in any individual claim. No other viable procedure has been identified to resolve the claims.

> **73** The goal of judicial economy also favours a class proceeding. Admittedly, maximum judicial economy will result if this action is not certified, in that no claim would be advanced at all. However, this result hardly strikes me as what the courts had in mind in terms of judicial economy. Moreover, it would be an overly rigid interpretation of the *CPA* and inconsistent with the instructions in *Hollick*, *supra,* at para. 15 that 'Courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters'. I agree with Winkler J. in *1176560 Ontario Ltd.* at para. 45:
>
> > Arguments that no litigation is preferable to a class proceeding cannot be given effect. If there is any basis to this argument, it is subsumed in the cause of action element of the test for certification.
>
> **74** Thus, judicial economy should focus on the relationship of the common issues to the other issues in the case. Viewed from this perspective, a class proceeding is not inconsistent with judicial economy. If I am right that the voluntariness defence can be determined on a class wide basis and that ss. 23 and 24 can resolve the issues of quantum and distribution of the monetary award, the entire case will be determined by resolution of the common issues. It will not be necessary to engage in trials of any individual issues.

[153] In my view, a class proceeding is the preferable procedure in this case. The defendants have not identified an alternate procedure. It seems to be their position that no litigation is preferable to a class proceeding. That argument has been already rejected in *Markson.*

[154] A class proceeding would meet the goals of behaviour modification and access to justice. If the defendants engaged in the behaviour alleged, then a successful class proceeding would presumably discourage such behaviour in future. A class proceeding would have the advantage of requiring the defendants to account for the economic harm it has caused.

[155] Access to justice favours a class proceeding. As in *Markson,* the amounts involved, at least for the indirect class, are likely very small and, as a result, it would be most unlikely that individual claims would be pursued. The legal and other fees to pursue such a claim would be enormous and out of proportion to the amounts in issue in any individual claim. As I have already noted, no other viable procedure has been identified to resolve the claims.

[156] Finally, the goal of judicial economy favours a class proceeding. The issue of whether there was a conspiracy can be resolved on a class-wide basis. It is not necessary to establish that damages were suffered by every member of the class and the use of the aggregation provisions of the Act favours certification.

5. Appropriate Representative

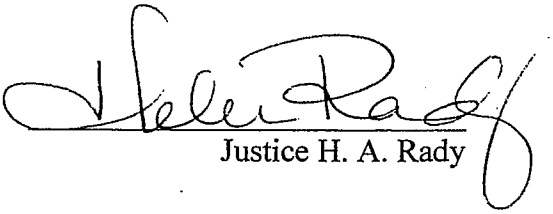
[157] The defendants submit that the representative plaintiffs have an inherent conflict and are therefore unsuitable.

[158] I agree with the defendants' submission that there may be a conflict between the direct and indirect purchasers arising from the impact of passing-on. I am not persuaded, however, that this disqualifies them from acting in a representative capacity. Plaintiffs' counsel recognize the issue and certainly when settlement was achieved with the other defendants, steps were taken to ensure that any conflict between the two groups was resolved.

[159] The plaintiffs have also submitted an adequate litigation plan providing for:

1. methods of communicating with class members;
2. procedures for opting out;
3. a litigation schedule;
4. trial of the common issues;
5. litigation steps thereafter

[160] For these reasons, an order shall issue granting certification.



Justice H. A. Rady

Released: September 28, 2009

COURT FILE NO: 47025

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

IRVING PAPER LIMITED, IRVING PULP & PAPER, LIMITED, 3969410 CANADA INC. c.o.b. as PARK AVENUE HAIR SALON, DISTRIBUTECH INC. and STACEY LEAVITT

Plaintiffs

- and -

ATOFINA CHEMICALS INC., ARKEMA INC., ARKEMA CANADA INC., ARKEMA S.A., FMC CORPORATION, FMC of CANADA, LTD., SOLVAY CHEMICALS INC., SOLVAY S.A., DEGUSSA CORPORATION, DEGUSSA A.G., DEGUSSA CANADA INC., EKA CHEMICALS, INC., EKA CHEMICALS CANADA INC., AKZO NOBEL CHEMICALS INTERNATIONAL B.V., KEMIRA OYJ and KEMIRA CHEMICALS CANADA INC

Defendants

REASONS FOR JUDGMENT

RADY, J.

Released: September 28, 2009