CITATION: Irving Paper -and- Atofina, 2010 ONSC 2705
COURT FILE NO.: 47025
DATE: 2010/06/08

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

IRVING PAPER LIMITED, IRVING PULP & PAPER, LIMITED, 39369410 CANADA INC. c.o.b. as PARK AVENUE HAIR SALON, DISTRIBUTECH INC. and STACEY LEAVITT

Plaintiffs

Charles M. Wright, Heather Rumble Peterson and Linda Viser for the 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

Paul J. Martin and Laura F. Cooper for the defendants FMC

Robert Kwinter & Catherine Beagan Flood for defendants Arkema

HEARD: January 27, 2010

LEITCH J.

[1] FMC Corporation and FMC of Canada, Ltd. ("FMC") seek an order granting leave to appeal to the Divisional Court from the September 28, 2009 decision of Rady J. that certified this

proceeding as a Class Action pursuant to the *Class Proceedings Act, 1992,* S.O. 1992 c. 6 ("CPA").

[2] Arkema Inc., Arkema Canada Inc. and Arkema S.A. ("Arkema") support this motion by FMC. FMC and Arkema filed materials on the motion and counsel for both FMC and Arkema made submissions. I refer to FMC and Arkema as the moving parties.

[3] For the reasons that follow, I dismiss the motion for leave to appeal. I have concluded that the certification judge did nothing inconsistent with *Chadha v. Bayer Inc.* (2001), 54 (3d) 520 (Div. Ct.); aff'd (2003), 63 O.R. (3d) 22 or *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) even though my interpretation of *Markson* differs from the interpretation of the certification judge. I am of the view that loss must be provable on a class wide basis whereas the certification judge commented otherwise. However, I have concluded there is no good reason to doubt the correctness of the certification order and there is no conflicting decision on the matter involved in the proposed appeal. The plaintiffs presented expert opinion evidence that damages could be determined on a class-wide basis; the defendants' expert challenged this evidence. The certification judge properly considered all of the evidence. There was some basis in fact for each of the certification requirements.

Overview

[4] The plaintiffs have brought this action on behalf of all persons in Canada who purchased hydrogen peroxide, products containing hydrogen peroxide or products produced using hydrogen peroxide in Canada between January 1, 1994 and January 5, 2005.

[5] The plaintiffs allege that the defendants, who are manufacturers and sellers of hydrogen peroxide, conspired to and did fix the prices for hydrogen peroxide.

[6] Hydrogen peroxide is used in manufacturing paper and paper products, mining, chemical manufacturing, textile manufacturing, water treatment, food processing and the manufacturer of semi-conductors.

[7] As I see it, the main issue on the certification motion was the extent to which the causes of action required proof of individual loss or damage. That issue, of course, led to what Rady J. described as the "real question" of whether there was sufficient evidence in the record to support the plaintiffs' contention that the proposed common issues relating to harm and aggregate damages were appropriate and viable common issues which, in turn, impacted upon her decision respecting whether a class proceeding is the preferable procedure.

[8] The common issues which were particularly contentious were the following:

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

The plaintiffs had broken down this common issue to include the following questions:

> Did the plaintiffs and other class members suffer injury?
>
> Did the defendants, or some of them, breach part VI of the *Competition Act*?
>
> Can damages be measured on an aggregate, class wide basis and if so, what are the aggregate damages?
>
> 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 s. 36 of the *Compensation Act* and if so, in what amount?

[9] As Rady J. noted, the other proposed common issues related to the existence and scope of a conspiracy and could be made out without any reference to individual class members.

[10] Both parties filed affidavits from their experts on the certification motion. Dr. Beyer is the plaintiffs' expert and Dr. Schwindt is the expert retained by the defendants.

[11] Dr. Beyer's professional experience "includes the analysis of economic issues involved in antitrust litigation, including matters concerning the structure and conduct of industries, the definition of relevant markets, the determination of economic impact, and the estimation of damages." As he set out in his affidavit, he was asked by the plaintiffs to

determine whether the defendants' alleged conspiracy would have impacted members of the proposed class and if there are acceptable damage methodologies available to estimate the economic impact of the defendants' alleged cooperative behavior on members of the proposed class. Dr. Beyer provided a written report wherein he expressed his opinion that: "There are sufficient reliable data and methodologies to estimate damages on a class-wide basis. The data that will be employed will come from publicly available data as well as from the defendants' transactions and cost data with which plaintiffs expect to be supplied."

[12] His ultimate conclusion was 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. I have also concluded that there are feasible methods to estimate aggregate damages on a common basis."

[13] Dr. Schwindt provided his opinion that "[i]t cannot be concluded that the alleged conspiracy could have imposed supra-competitive prices" but if it did, it would not have been on a class-wide basis. According to Dr. Schwindt the "[i]mpact, if any, would vary between customers and would have to be determined on an individual basis" and "no feasible methodology has been identified to quantify the impact, if any, of the alleged conspiracy on the price of hydrogen peroxide." It was his opinion that most of any price increase would have been passed through to foreign consumers and "to the limited extent that there would have been pass-throughs to Canadian consumers, there is no feasible methodology to identify and quantify these pass-throughs."

Significant paragraphs from the certification decision relevant to this motion for leave to appeal

[14] Rady J. concluded there was sufficient evidence presented by the plaintiffs to satisfy their burden with respect to the commonality of the issues raised by the class members' claims and the preferability of a class proceeding.

[15] This motion for leave to appeal raises the question of whether Rady J. properly interpreted the decisions of the Divisional Court and Court of Appeal in *Chadha*. Both the

plaintiffs and the defendants contended before Rady J. that *Chadha* supported their positions. As observed by Rady J., *Chadha* was the first contested price-fixing certification motion in Canada involving a proposed class of indirect purchasers.

[16] This motion for leave to appeal also allegedly raises the propriety of Rady J.'s conclusion that the decisions in *Markson* and *Cassano v. Toronto Dominion Bank* (2007), 87 O.R. (3d) 401 (C.A.) "signal a different approach to be taken to certification" in a price-fixing case, despite the Ontario Court of Appeal's affirmation in those cases of *Chadha*.

[17] Further, this motion for leave to appeal raises the question of the adequacy of the certification judge's evaluation of the expert evidence in paras. 119 – 150.

[18] Set forth below are portions of the reasons of Rady J. that relate to these conclusions.

> 116. At the heart of the debate is whether the decision in *Chadha* has been overtaken by the recent Court of Appeal decision 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.
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> 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.*
>
> 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. Beyer's 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.

Test for leave to appeal to the divisional court

[19] The CPA authorizes an appeal of an order certifying a proceeding as a class proceeding with leave. Subsection 30(2) provides:

> A party may appeal to the divisional court from an order certifying a proceeding as a Class Proceeding, with leave of the Superior court of Justice as provided in the rules of court.

[20] Rule 62.02(4) sets out the grounds on which leave may be granted. The rule provides as follows:

> Leave to appeal shall not be granted unless,

> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted: or
>
> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matter of such importance that, in his or her opinion, leave to appeal should be granted.

[21] In determining whether there is "good reason to doubt the correctness of the order" pursuant to sub-rule 62.02(4)(b), it is not necessary that the court considering the motion for leave disagree with the reasons of the motions judge or even to conclude that the decision is probably wrong. The applicant for leave to appeal must only show that it is debatable that another decision ought to have been made (*Ash v. Lloyds Corp.* (1992), 8 O.R. (3d) 282 at 284 (Gen. Div.); *MacGregor v. Royal Sun and Alliance Insurance Co. of Canada* (2009), O.J. No. 3573 (S.C.J.) at para. 20.)

[22] The requirement of "importance" pursuant to both subrule 62.02(4)(a) or (b), contemplates matters of public importance that reach beyond the interests of the parties to the action and include matters generally relevant to the development of the law and the administration of justice (*Ash v. Lloyds, supra* at 284).

Position of the Moving Parties

[23] FMC and Arkema's position is that *Chadha* is a binding decision that, if properly interpreted, would have prevented the certification of this action and it is their position that *Markson* and *Cassano* have not overtaken *Chadha*.

[24] In regard to s. 24 of the CPA being relied on to meet the commonality and preferability requirements in subsection 5(1) of the Act, the moving parties rely on the Divisional Court decision in *Chadha* which concluded that s. 24 did not assist in establishing compensable injury on a class-wide basis. The moving parties refer to the following affirmation by the Court of Appeal at para. 49:

> The Divisional Court also rejected several other methods referred to by the motion judge for arriving at class-wide proof of loss. First, the Divisional Court held that s. 24 of the Class Proceedings Act, which deals with an aggregate assessment of monetary relief, cannot resolve the problems of proving loss on a class-wide basis. I agree that s. 24 of the Class Proceedings Act is applicable only once liability has been established, and provides a method to assess the quantum of damages on a global basis, but not the fact of damage. [p. 41]

[25] Relying on *Chadha*, the moving parties submit that s. 24 of the CPA is applicable only once liability is established; it cannot establish the fact of liability itself.

[26] They submit that this decision on certification essentially overruled *Chadha* and thus there is good reason to doubt its correctness.

[27] The moving parties strenuously assert that, in order to satisfy the certification test, the plaintiffs must show a workable method to establish damages on a class-wide basis. In order to do this, they must prove: 1) that the conspiracy resulted in an overcharge, 2) that all direct purchasers absorbed the charge and therefore suffered damages, or 3) that the overcharge was passed on to all indirect purchasers who suffered damage as a result. Unless the plaintiffs have the methodology to do this, liability is not a common issue.

[28] According to the moving parties, the defendants' expert challenged all findings of the plaintiffs' expert Dr. Beyer – that is, whether or not there was an overcharge, whether there was harm to direct purchasers and whether there was harm to indirect purchasers. They say that the expert evidence at issue did not go to the merits of the plaintiffs' claims, but rather to a central issue in the certification test, that is whether it is possible to develop a methodology capable of proving loss on a class-wide basis.

[29] The moving parties note that Rady J. had powerful conflicting evidence on all of these key points and it was wrong to conclude that there was no need to reconcile the conflicting opinions at the certification stage of the proceeding.

[30] The moving parties take the position that, subsequent to *Markson*, in cases involving alleged price-fixing conspiracies and problems of proving loss by reason of pass-through complications, courts have held that *Chadha* and not *Markson* is the governing

authority. In support of this, they cite *Steele v. Toyota Canada Inc.*, [2008] B.C.J. No. 1496 (S.C.), *Axiom Plastics Inc. v. E.I. DuPont Canada Co.* (2007), 87 O.R. (3d) 352 (S.C.J.), leave to appeal denied (2008), 90 O.R. (3d) 782 (Div.Ct.) and, *2038724 Ontario Ltd. v. Quizno's-Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252 (Div. Ct.).

[31] The moving parties submit that the certification judge's conclusion that "a methodology *may* exist for the calculation of damages" is not sufficient to meet the test for certification. Rather, what is required is proof that a methodology *does* exist that would enable the plaintiffs, on common evidence, to prove class-wide injury.

[32] Subsequent to the certification decision, the British Columbia Court of Appeal released its decision in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 allowing the appeal, setting aside the order refusing certification and certifying the action as a class proceeding. Last week, leave to appeal to the Supreme Court was dismissed: *Pro-Sys Consultants Ltd. v. Infineon Technologies*, [2010] S.C.C.A. No. 32. The moving parties take the position that this decision is distinguishable from the case at bar; further, in *Pro-Sys*, the Court of Appeal was bound by British Columbia case law and therefore had no regard for *Chadha*; and, in any event, the moving parties submit that *Pro-Sys* was wrongly decided.

Position of the Plaintiffs

[33] The plaintiffs take the position that the certification judge did not err in certifying the action on behalf of a class consisting of both direct and indirect purchasers of hydrogen peroxide. Her decision, they say, does not conflict with *Chadha*; she simply reached a different conclusion taking into account the unique facts of this case which differ from those before the Court of Appeal in *Chadha*.

[34] The plaintiffs further claim that Dr. Beyer's opinion follows the road map set out by the Court in *Chadha* for the certification of a price-fixing case. This, according to the respondents, exceeds the evidentiary threshold established by the B.C. Court of Appeal in *Pro Sys* at paras. 67 – 68, where the Court held that the plaintiff is only required to show a "credible or plausible methodology" for proving aggregate loss.

[35] The plaintiffs further disagree with the moving parties' assertion that the certification judge should have weighed the expert opinion evidence. It is their position that the law is clear: a certification judge is not to engage in a weighing of expert evidence. Rather, she only need be satisfied that there is some basis in fact that the certification requirements have been met. The plaintiffs contend that the certification judge thoroughly canvassed the evidence of both experts at paras. 119 to 143 of her decision. She concluded that, although she understood the defendants' criticisms of Dr. Beyer's report, she was satisfied that a methodology for calculating the damages may exist, and was unable to say that his opinion would not be accepted by a court.

[36] In addition, the plaintiffs make a separate submission that, although preferable and supported on the evidentiary record, there is no need for harm to be established on a class-wide basis. They assert that, in the absence of an aggregate damages assessment, it would be entirely feasible to determine harm on an individual basis with respect to a discrete number of direct purchasers noting that, unlike *Chadha*, this class is comprised of a large number of such purchasers, as well as those persons who purchased hydrogen peroxide indirectly. Conversely, in *Chadha*, in the absence of a class-wide determination of harm, and therefore liability, the case would have been unmanageable.

Analysis

[37] The parties advised me that Rady J.'s certification decision is the first decision in the context of a contested price-fixing certification motion involving direct and indirect purchasers. The moving parties say, as a result, there can be no doubt of the public importance of this issue. They submit that the decision impacts on the threshold issue of class actions certification and the extent to which the certification judge must weigh and assess conflicting evidence.

[38] Although the plaintiffs take a contrary view, I am prepared to accept that the requirement of public importance is met on this leave motion with the result that my analysis will

focus on whether it is debatable that another decision ought to have been made and whether there are conflicting decisions.

[39] Essentially, the moving parties assert that liability has not been established. They claim that the certification judge implicitly accepted that *Markson* and *Cassano* have changed the law as set out in *Chadha*. However, they state, this is wrong; *Chadha* remains good law. Section 24 is applicable only once liability is established; it cannot establish the fact of liability itself.

[40] The problem the plaintiff faced in *Chadha* resulted from the lack of an evidentiary record before the court. Feldman J.A. commented on this problem in para. 65 as follows:

> 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.

[41] In *Markson* and *Cassano*, the plaintiffs did not face the same challenge as the plaintiff in *Chadha* because the class members were in a contractual relationship with the defendants. As a result, once the defendants' alleged wrongdoings were proven, the defendants would potentially be liable to each class member for breach of contract without proof of any consequential financial loss. As the Court of Appeal in *Markson* held at para. 49:

> **49** In the context of this case, if the plaintiff can establish that the defendant administered its cash advances in a manner that violated s. 347 and/or breached its contract with its customers, it will have established potential liability on a class-wide basis. Each member of the class would be entitled to declaratory and injunctive relief. The only matter remaining would be the application of the decision on the common issues to the specific account activity of each class member to determine that class member's entitlement to monetary relief. Section 23 can be used to calculate the global damages figure. Section 24 can be used to find a way to distribute the aggregate sum to class members. It may be that in the result some class members who did not actually suffer damage will receive a share of the award. However, that is exactly the result contemplated by s. 24(2) and (3)

> because "it would be impractical or inefficient to identify the class members entitled to share in the award".

[42] The Court of Appeal noted at para. 55 that this conclusion was not inconsistent with *Chadha.*

> **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.

[43] The moving parties submit that by using the phrase "potential liability" Rosenberg J.A. was referring to actual liability. Because *Markson* alleged a breach of contract by the defendant, its actual liability to each individual class member was established if the breach was proven. There was no need in *Markson* to prove individual loss. That submission has merit, in my view, because the court in *Markson* specifically confirmed *Chadha* in para. 55 set out above and para. 40 as follows:

> The statistical sampling authorized by s. 23 cannot be used to determine the defendant's liability. Rather, s. 23 provides a means "of determining issues relating to the amount or distribution of a monetary award". Similarly, this court held in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 at para. 49, leave to appeal refused [2003] S.C.C.A. No. 106, that s. 24 'is applicable only once liability has been established, and provides a method to assess the quantum of damages on a global basis, but not the fact of damage."

[44] Similarly, in *Cassano* proof of the breach of contract created liability to all of the class members. As noted by the court at para. 42:

> In the present case, unlike in *Markson,* the determination of the common issue relating to the breach of contract question will determine liability to all members of the class, with the only possible remaining issue being that of damages. Despite this distinction, the comments in *Markson* related to the proper interpretation of s. 24 of the *CPA* are useful for present purposes.

[45] I am inclined to the view of the moving parties that the statistical evidence provisions in s. 23 and the aggregate damages provisions in s. 24 cannot be utilized to demonstrate that class-wide injury can be proven as a common issue, nor can those provisions allow a plaintiff to avoid proof of class-wide injury.

[46] The Divisional Court in *2038724 Ontario Ltd. v. Quizno's-Canada Restaurant Corp.* (2008), 89 O.R. (3d) 252 (S.C.J.) at para. 118 referenced *Chadha* and stated that "Section 24 of the CPA is procedural in nature, and cannot aid in proving an element of liability".

[47] Cullity J. applied *Quizno's* and reached a similar conclusion when he considered a claim for breach of fiduciary duty. He observed in *Grant v. Canada (Attorney General)*, [2009] O.J. No. 5232 (S.C.J.) at para. 111-113, as follows:

> **111** In *Markson* the Court of Appeal accepted the earlier finding in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.) at para. 49 that section 24(1)
>
> > ...is applicable only once liability has been established, and provides a method to assess the quantum of damages on a global basis, but not the fact of damage.
>
> **112** The subsequent substitution in *Markson* and *Cassano v. Toronto-Dominion Bank*, [2007] O.J. No. 4406 (C.A.) of "potential liability" for the purpose of the requirement that liability be first established has in later cases been held not to permit an aggregate assessment where proof of damage is an essential requirement for the existence of liability: *2038724 Ontario Ltd. v. Quizno's-Canada Restaurants Corp.* (2008), 89 O.R. (3d) 252 (S.C.J.), at paras. 120-123; *Steele v. Toyota Canada Inc.*, [2008] B.C.J. No. 1496 (S.C.) at para. 122.
>
> **113** *Markson* and *Cassano* involved claims for restitution and breach of contract – claims for which the Court of Appeal was satisfied that liability – or "potential liability" – did not require the fact of damage to be established. The claim for breach of fiduciary duty – but not the claim for negligence – in this case may, I believe, be placed in the same category; cf., *Pro-Sys* at paras. 36-40. Accordingly, I will accept common issue #12 for the purposes only of the claim for breach of fiduciary duty.

[48] The moving parties point out that arguably, a different interpretation of Rosenberg J.A.'s comments in *Markson* was proffered by Lax J. in *Fresco v. Canadian Imperial Bank of*

Commerce (2009) 71 CPC (6th) 97 (Ont. S.C.J.). As a result, the moving parties submit that there are "significant unanswered questions" remaining after the Court of Appeal decisions in *Markson* and *Cassano* and the proposed appeal provides a valuable opportunity to address some of those questions.

[49] In this case, as was the case in *Chadha*, there must be evidence to prove class-wide loss. As the Court of Appeal in *Markson* made clear, the plaintiff in *Chadha* was unsuccessful because it "adduced no evidence that the result of the defendants' allegedly illegal acts were passed through to the consumers who made up the proposed class."

[50] It is clear from *Chadha*, that economic expert evidence regarding the provability of class-wide loss is evidence that must be evaluated, and upon which findings must be made at the certification hearing. As Feldman J.A. stated at para. 28:

> [28] Although the motion judge expressed reservations about the need for the appellants' expert evidence at this stage of the proceedings, it is only on the basis of that evidence that any determination can be made as to whether loss can be proved on a class-wide or an individual basis, and therefore whether it can be a common issue.

[51] I am inclined to agree with the position of the moving parties that *Chadha* established the following propositions as set out in para. 13 of the reply factum of FMC with the exception that subparagraph (d) goes too far:

> (a) Where damages are sought on behalf of indirect purchasers whose claims depend upon damage suffered as a result of price increases being passed through to such purchasers, the action will be unmanageable (and therefore not preferable under paragraph 5(1)(d) of the CPA) if injury and loss must be proven on an individual basis;
>
> (b) If the plaintiff seeks to certify proof of loss as a common issue (thereby addressing the foregoing unmanageability problem), it must be shown, by admissible, cogent and persuasive evidence, that there exists some methodology by which loss can be proven on a class-wide basis;

(c) Evidence to demonstrate to the certification court that loss will be provable on a class-wide basis at the common issues trial must necessarily take the form of expert economic evidence; and

(d) The certification court must evaluate and weigh the expert evidence adduced by both parties, and must ultimately decide whether that evidence does or does not demonstrate the existence of a viable methodology

As outlined more fully below, in my view, the certification judge is to evaluate and weigh the expert evidence to determine whether there is some basis in fact to find that proof of aggregate damages on a class wide basis is a common issue. While that might require some review of the evidence, the assessment should not relate to the merits of the claim or the resolution of conflicting expert reports (see *Quizno's* at para. 102)

[52] The plaintiffs adduced evidence of the nature described in *Chadha* for the consideration of the certification judge. This evidence stands in contrast to the evidence produced by the plaintiffs in *Chadha* where as Feldman J.A. observed at para. 30:

> ...the appellants'expert effectively assumes that higher costs of products containing the respondents' iron oxide pigment would have been passed on to end-users, reasoning that they would have been willing to pay the higher cost because the amounts in question were so minimal.
>
> ...
>
> The expert's models are based on the assumption of a full pass-through of the price increase of the iron oxide to the homebuyers. However, it is that assumption that is the very issue that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified as such.

[53] In *Chadha*, the plaintiffs' expert opined that "There would be a measurable price impact upon the ultimate consumer of the building products containing the iron oxide pigment". Feldman J.A. stated at para. 31:

> ...the fact that any price impact may be "measurable" goes only to the issue of how the damages can be calculated and distributed, not whether

> the inflated price charged to the direct buyers of the product was passed through to all of the ultimate consumers. The issue of whether there would be a price impact on all ultimate consumers of iron oxide coloured products, i.e., a pass-through to the class members of the inflated price charged by the respondents to their direct buyers, was what the expert assumed, but he did not indicate a method for proving, or even testing that assumption.

[54] Unlike the expert opinion in *Chadha*, Dr. Beyer analyzed the market and, relying on economic theory, industry reports, pricing information and other empirical evidence, concluded that the alleged conspiracy would have had a common impact on all direct purchaser members of the proposed class. Dr. Beyer also considered whether any of the overcharge would have been passed through to indirect purchasers, concluding that, in at least two major applications of hydrogen peroxide, it would have impacted indirect purchasers. Dr. Beyer did not assume pass through, as did the expert in *Chadha*, but rather analyzed this issue based on the available evidence and concluded that the extent to which any overcharge was passed through could be determined using a regression analysis.

[55] While Dr. Schwindt challenges Dr. Beyer's opinion, the certification judge is not obliged to make any determination on the merits of these opinions. Rather, the certification court must ultimately decide whether that evidence does or does not demonstrate the existence of a viable methodology for proving loss on a class-wide basis. At the end of the day, the certification judge was satisfied that the plaintiffs' expert evidence demonstrated that class-wide injury and the quantum of damages could be proven as common issues notwithstanding the defendants had tendered evidence from its own expert witness critical of the methodology proposed by the plaintiff's expert. I disagree with the contention of the moving parties that the certification judge did not evaluate this evidence. In my view, the certification judge adequately considered this evidence and was not required to engage in a determination of the merits.

[56] The certification judge's position in regard to the required consideration of expert evidence presented in relation to certification requirements (other than disclosure of a cause of action) is consistent with that enunciated by the British Columbia Court of Appeal in *Pro-Sys*. I find the following comments at paras. 64 and 65 persuasive:

64 The provisions of the *CPA* should be construed generously in order to achieve its objects: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby making economical the prosecution of otherwise unaffordable claims); and behavior modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation): *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 26-29 [*Western Canadian Shopping Centres*]; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15 [*Hollick*].

65 The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: *Hollick* at para. 16. The burden is on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading disclose a cause of action: *Hollick*, at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one – it requires only a "minimum evidentiary basis": *Hollick*, at paras. 21, 24-25; *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (S.C.J.) at para. 19. As stated in *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50 [*Cloud*],

[O]n a 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.

66 Accordingly, where expert opinion evidence is adduced at the certification hearing, as it was here, it should not be subjected to the exacting scrutiny required at a trial. On this point, I adopt the remarks of J.L. Lax J. in *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.) at para. 76:

...

67 The chambers judge subjected the evidence of Dr. Ross to rigorous scrutiny. He weighed it against the respondents' evidence and against Ms. Sanderson's evidence in particular. In so doing, he failed to take into account that the factual evidence upon which Ms. Sanderson's opinion was based came in part from the respondents and was untested. Further, he failed to adequately consider that Dr. Ross' opinion was necessarily preliminary since the appellant has not yet had access to the information

> Dr. Ross needs to perform his analysis. In my view, this approach was fundamentally unfair at this stage of the proceeding, when the appellant has not had discoveries and an adequate opportunity to marshal the evidence required by Dr. Ross for his analysis.

[57] The certification judge's approach is also consistent with the approach of the court in *Grant* and *Lambert*. In *Grant,* where the reasoning in *Pro-Sys* was applied, Cullity J. discussed the role of evidence at a certification hearing. At para. 20, he stated:

> **20** At the certification stage, evidence will usually be important to explain the background to the litigation. Otherwise, the role and weight of the evidence required is quite limited as is indicated in the following passage from the recent decision of the British Columbia Court of Appeal in *Pro-Sys Consultants Ltd v. Infineon Technologies AG,* 2009 BCCA. 503 (November 12, 2009), at para 65:
>
> > The certification hearing does not involve an assessment of the merits of the claims; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: *Hollick* at para. 16. The burden is on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleadings disclose a cause of action: *Hollick,* at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one -- it requires only a "minimum evidentiary basis": *Hollick,* at paras. 21, 24-25; *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (S.C.J.) at para. 19. As stated in *Cloud v Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2006] S.C.C.A. No. 50 ...
> >
> > > [O]n a 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.

[58] Similarly, in *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (S.C.J.), *leave to appeal denied* [2009] O.J. No. 4464 (Div Ct.). Cullity J. emphasized that a certification hearing is not intended to be a preliminary merits test. At para. 67, Cullity J. stated:

> **67** It was repeatedly submitted by defendants' counsel that decisions certifying proceedings must have an "air of reality". To the extent that this means that the statutory requirements must be read and applied in the light of the purposes and objectives of the legislation, it is a truism. To the extent, however, that references to an air of reality are intended to introduce a preliminary merits test - disguised or otherwise - they are inconsistent with the analysis in *Hollick* and the significance that McLachlin C.J. attributed to the rejection of the views of the Ontario Law Reform Commission.

[59] Cullity J. further observed at para. 68:

> **68** The legislative history was relied on in *Hollick* as justifying the very weak evidential burden of "some basis in fact" that was held to apply to each of the statutory requirements for certification, other than that relating to the disclosure of a cause of action. It must, I believe, follow logically that, although a defendant would be entitled to deliver affidavit evidence in rebuttal, the standard of proof is inversely heavy. It is not enough for the defendant to establish on a balance of probabilities that facts that bear on the existence of "colourable" claims differ from those asserted by the plaintiff - the onus must be to demonstrate that there is no basis in the evidence for the latter. ...

[60] Justice Cullity went on to explain at para. 69 and 70:

> **69** The analysis in *Hollick* must be applied and the plaintiff must not be subjected to any more stringent an evidential burden than that affirmed by the Chief Justice. I believe it follows, also, that in determining the weight to be given to the evidence in rebuttal filed by the defendants, I must take into account that it is not the function of the court at this preliminary stage of the proceeding to decide factual issues – and, for such purpose, to weigh, and draw inferences from, the evidence – in the same manner, and to the same extent, as when the court exercises its function as a trier of fact in the exercise of its ordinary jurisdiction.
>
> **70** Most fundamentally, the purpose of the certification stage of a class proceeding is to determine whether the requirements in section 5 (1) of the CPA are satisfied and, if so, to define the issues to be tried. It would be a reversal of the process to permit certification to be determined by deciding issues that are likely to be front and centre at a trial.

[61] I disagree with the moving parties' submission that *Chadha* requires a certification judge to evaluate the evidence respecting a methodology and make findings as to whether or not the methodology accords with sound principles of economic science.

[62] As was the case in *Pro-Sys*, the plaintiffs have shown a credible and plausible methodology to establish damage on a class-wide basis. In my view, Dr. Beyer's opinion provides some basis in fact to satisfy the certification requirements of commonality and preferability. The fact that the defendants strenuously challenged the validity of that opinion does not lead to the conclusion that it ought not to be accepted at this stage of the proceeding. This reasoning is consistent with the conclusions of the majority in *Quizno's*.

[63] In *Quizno's*, the plaintiffs adduced expert evidence to demonstrate that class-wide injury and the quantum of damages could be proven as common issues, and the defendant tendered evidence from its own expert witness critical of the plaintiffs' experts' proposed methodologies. The motion judge weighed the conflicting evidence, finding that the plaintiffs had failed to demonstrate a workable methodology. The majority of the Divisional Court allowed the appeal holding that the non-expert evidence was sufficient to show "some basis in fact" in support of the proposition that class-wide loss or damages could be proven as a common issue. The expert evidence proffered by the plaintiff was not acceptable because the expert proceeded on the assumption damages were caused by the price fixing. As the majority observed at para. 94:

> **94** Given that the appellant's expert was asked to assume that there were damages as a consequence of the price maintenance, it would not have been appropriate to accept the evidence of the expert to provide some basis in fact of that very issue. In *Chadha, supra*, the expert evidence was rejected in part for assuming the very fact that his opinion was tendered to substantiate – that loss was passed through to the indirect purchaser.

[64] The Divisional Court in *Quizno's* went on to discuss the "conflicting expert opinions by highly specialized economists" which were before the court. The majority concluded at para. 102:

> **102** It is neither necessary nor desirable to engage in a weighing of this conflicting evidence on a certification motion. The plaintiffs on a certification motion will meet the test of providing some basis in fact for the issue of determination of loss to the extent that they present a proposed methodology by a qualified person whose assumptions stand up to the lay reader. Where the assumptions are debated by experts, these questions are best resolved at a

> common issues trial. A motions judge is entitled to review the evidentiary foundation to determine whether there is some basis in fact to find that proof of aggregate damages on a class wide basis is a common issue. While that might require some review of the evidence, the assessment should not relate to the merits of the claim or the resolution of conflicting expert reports.

[65] In this case, as required by *Chadha*, there is evidence that establishes class-wide harm and a method of how to assess damages. The certification judge considered that evidence and concluded the plaintiffs had met their evidentiary burden in relation to the certification requirements of commonality and preferability. There is no good reason to doubt the correctness of the certification order.

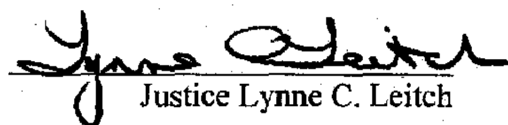
[66] As I previously set out, courts have clearly stated that *Chadha* remains good law and evidence must be presented on a certification motion to demonstrate that class-wide loss will be provable, whereas the certification judge suggested that *Markson and Cassano* overtook *Chadha* and interpreted the phrase "potential liability" in *Markson* in a different way. Nevertheless, I do not doubt the correctness of her certification order. Evidence was before her on the certification motion and she considered it as well as the defendants' expert evidence challenging it. In my view, there was some basis in fact for each of the certification requirements and thus I am not satisfied that the test for leave to appeal under r.62.02(4)(b) has been made out.

[67] Further, while as I have outlined there are decisions that take a different position than the certification judge with respect to whether *Chadha* has been overtaken, nevertheless, I do not find there is a conflicting decision on the matter involved in the proposed appeal. I could agree with the position of the moving parties if the certification judge had to rely on her statements respecting *Chadha* and *Markson* in order to make the certification order – that is, the situation would be different if the plaintiffs had not adduced evidence that there is a methodology to prove class-wide injury. Dr. Beyer clearly opined that there was such a methodology. Dr. Schwindt challenges the credibility of that methodology. However, there is some basis in fact to satisfy the certification requirements.

[68] This case is quite different than the case before the B.C. Supreme Court in *Steele*. The difficulty for the plaintiff in *Steele* was the fact that its expert evidence fell short of establishing liability on a class-wide basis. At para. 121, Justice Ehrcke agreed with the plaintiffs "that it is not appropriate to attempt to resolve the conflicts between the opinions of the various experts" but noted "the onus nevertheless is on the plaintiff to lead some evidence to show that proof of loss on a class wide basis may be possible". He concluded the plaintiff had not been successful in doing do so because there was common agreement that the plaintiffs' expert analysis did not reach the standard of statistical significance that is commonly employed in the profession.

[69] Therefore again I am not satisfied that the test for leave to appeal under r.62.02(4)(a) has been made out.

[70] For the foregoing reasons the motion for leave to appeal is dismissed. If necessary counsel may make brief written submissions on costs within 30 days.



Justice Lynne C. Leitch

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

IRVING PAPER LIMITED, IRVING PULP & PAPER, LIMITED, 39369410 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

LEITCH J.

Released: June 8, 2010