9. Price-Fixing Cases

Class Actions Law and Practice, 2nd. Ed.

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Commentary

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9. ***Price-Fixing*** Cases

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A number of cases have been commenced alleging ***price-fixing*** conspiracies and breaches of the *Competition Act*.[1] These cases seek to recover the amount that purchasers overpaid for products as a result of the conspiracy. Prior to the enactment of class proceedings acts, similar cases were not brought, and therefore novel procedural and substantive issues are now being determined.

Pro-Sys Consultants Ltd. v. Microsoft Corporation[2] involved an allegation that Microsoft engaged in unlawful conduct by overcharging for certain of its operating systems and applications software. The representative plaintiff claimed that this unlawful conduct resulted in all of the class members paying higher prices for those products than they would have paid absent the unlawful conduct. The proposed class was made up of both direct purchasers who resold the products and indirect purchasers (*i.e.*, the ultimate consumers). The British Columbia Supreme Court certified the action. The British Columbia Court of Appeal allowed the appeal and dismissed the action, finding it plain and obvious that the class members had no cause of action on the basis that indirect purchasers do not have a cause of action in Canada.

This decision was overturned by the Supreme Court of Canada, which held that it is not plain and obvious that indirect purchasers do not have a cause of action. The Court held that in rejecting the passing-on defence in previous cases, it did not shut the door on plaintiffs who can prove that harm was passed-on to them by the direct purchasers. The court comprehensively rejected policy arguments for denying indirect purchaser actions and held that the risk of double liability was illusory because courts could mitigate any threat of double liability through a proper damages assessment at trial.

In *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*,[3] direct and indirect purchasers of high fructose corn syrup ("HFCS") brought a class action alleging the respondents engaged in an illegal conspiracy fixing HFCS's price, thereby harming manufacturers, wholesalers, retailers and consumers. The action was certified by the British Columbia Supreme Court. The British Columbia Court of Appeal allowed the appeal in respect of the indirect purchasers, finding it was "plain and obvious" the indirect purchasers did not have a cause of action. While the Supreme Court of Canada held that class actions by indirect purchasers can be certified, it found that in this instance, the indirect purchaser class could not be certified because there was no evidence that indirect purchasers could self-identify themselves as members of the class. There was no evidence that purchasers could identify the

products they purchased which contained HFCS because, for example, such products may have instead contained liquid sugar.

Infineon Technologies AG v. Option consommateurs[4] involved a claim against a manufacturer of a dynamic random-access memory chip (DRAM), a microchip commonly used in a wide range of electronic devices, which had acknowledged its participation in an international ***price-fixing*** conspiracy. The plaintiffs alleged that this ***price-fixing*** conspiracy artificially inflated the prices of DRAM and products containing DRAM sold in Québec between April 1999 and July 2002, which caused harm to the direct and indirect purchasers of DRAM.

While certification of the class action was initially denied on the grounds that there was a risk of double recovery, that decision was reversed on appeal. The Quebec Court of Appeal held that the fusion of direct and indirect purchasers into one class eliminated the possibility of double liability. This decision was upheld by the Supreme Court of Canada, which further held that the representative plaintiff met the low evidentiary threshold required at the certification stage to demonstrate the possibility of a loss common to the members of the class. Whether causality and the actual harm suffered by the plaintiff class could be proved on a balance of probabilities was a question best left for trial.

Chadha v. Bayer Inc.[5] was commenced on behalf of all end-users of iron oxide. Motions for judgment were brought on the basis that indirect purchasers do not have causes of action.[6] These motions were unsuccessful. However, the proceeding itself was not certified as a class action. The Ontario Court of Appeal was of the view that it did not have a sufficient evidentiary record to establish that liability could be proven as a common issue. This finding resulted in an inability to assess damages in the aggregate, which in turn created manageability concerns.[7]

Vitapharm v. F. Hoffman-La Roche Ltd.[8] was commenced on behalf of all purchasers, including direct purchasers and all those at other stages. This approach may make an aggregate assessment of damages, and therefore certification, easier. The case was certified in a settlement context.

Alfresh Beverages Ltd. v. Archer-Daniels Midland was commenced on behalf of all purchasers of citric acid. The action was settled, and an “imaginative” distribution protocol was implemented whereby compensation was paid to different levels of members based on expert evidence presented concerning the harm suffered.[9] Similar approaches were taken in *Alfresh Beverages v. Hoechst Ag*,[10] wherein ***price-fixing*** in the market for sorbates was alleged, *Bona Foods Ltd. v. Pfizer Inc.*,[11] which dealt with alleged ***price-fixing*** in the market for sodium erythorbate, and in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG* (a parallel DRAM proceeding).[12] *Alfresh* and *Bona Foods* were settled prior to the contested motion for certification.

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While there had been uncertainty in the case law regarding the ability of a class of indirect purchasers to have an action certified, this issue was decisively addressed by the Supreme Court of Canada on October 31, 2013, when it released three decisions confirming the ability of indirect purchasers to claim on a class wide basis for damages arising from anti-competitive conduct.[13]

The Supreme Court of Canada held that it is not plain and obvious that indirect purchasers do not have a cause of action. The court stated that in rejecting the passing-on defence in its earlier decision of *Kingstreet Investments Ltd. v. New Brunswick (Finance)*,[14] it did not shut the door on plaintiffs who can prove that harm was passed-on to them. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation* specifically, the court comprehensively rejected policy arguments for denying indirect purchaser actions. The Court found that the risk of double liability was illusory, as the trial judge could mitigate any harm through its damages assessment at trial. The Court further held that while proving harm to indirect purchasers may be difficult, indirect purchasers have willingly assumed that burden. If they cannot prove loss, they will fail at trial, but that is no reason to bar their claim at the certification stage. What is required of the plaintiffs at the certification stage is that they demonstrate a methodology that can establish that “the overcharge was passed on to the indirect purchasers, making the issue common to the class as whole”. The

plaintiffs do not need to prove actual loss to the class at the certification stage, only that "there is a methodology capable of doing so".[15]

Plaintiffs once used restitutionary remedies in an effort to side-step the possibility of individual loss-based inquiries in ***price-fixing*** cases. However, with courts certifying statutory causes of action based on minimal scrutiny of expert evidence, plaintiffs may no longer need such restitutionary remedies to establish common issues. In addition, it now appears less likely that breaches of the *Competition Act* will ground such restitutionary remedies. In the first contested certification decision in a ***price-fixing*** case since the Supreme Court of Canada's trilogy of 2013 decisions, *Watson v. Bank of America Corporation*, the Supreme Court of British Columbia continued the trend of certifying ***price-fixing*** cases.[16] Nonetheless, the Court dismissed the claims for (i) unlawful conspiracy; (ii) intentional interference with economic relations; (iii) constructive trust; and (iv) breach of the statutory price maintenance provisions of the *Competition Act*. Relying on the British Columbia Court of Appeal's decision in *Wakelam v. Johnson & Johnson*,[17] the Court held that the statutory cause of action in s. 36 is the only remedy for a breach of the *Competition Act*.[18] On that basis, claims under the *Competition Act* could not constitute the foundation for other causes of action. However, on appeal, Justice Saunders of the British Columbia Court of Appeal held:

> In my view, it cannot be said that the scheme for civil redress in s. 36 of the *Act* is a replacement for an action in common law for unlawful means conspiracy. This is the same conclusion as was reached by Madam Justice Helper in *Westfair Foods Ltd. v. Lippens Inc.* (1989), 64 D.L.R. (4th) 335, [1990] 2 W.W.R. 42 (Man. C.A.), although for somewhat different reasons ... As in *Westfair*, I consider a claim for unlawful means conspiracy relying upon breach of the *Competition Act*, is a viable pleading. My conclusion extends to a claim in restitution and waiver of tort to the extent those claims derive from the tort of unlawful means conspiracy.[19]

Accordingly, the Court of Appeal allowed the plaintiff's appeal in part and certified "unlawful means conspiracy".

More recently, the British Columbia Supreme Court held, in *Fairhurst v. Anglo American PLC*,[20] that tort claims based on breaches of the *Competition Act* were not bound to fail, despite *Wakelam* which it deemed distinguishable on its facts. The court further stated that the Supreme Court of Canada's decision in *A.I. Enterprises v. Bram*[21] superseded that of *Wakelam* in this regard.[22]

For a period, there continued to be some doubt as to which purchasers could be class members in a ***price fixing*** case and whether the statutory rights of action provided by the *Competition Act* had extinguished common law rights of action. It had been frequently argued by the plaintiff bar that damages could extend to consumers who purchased products by manufacturers which were neither defendants nor conspirators, but which nonetheless raised prices in response to the impacts of the conspiracy to ***price fix*** by the defendants. These purchasers were described as "umbrella purchasers". Meanwhile the defence bar frequently argued that Parliament had ousted common law claims, such as conspiracy, when it provided a statutory remedy. The case law was not consistent on these legal issues. For example, in *Shah v. LG Chem Ltd.*, Justice Perrell applied *Wakelam* and rejected *Watson* from the British Columbia courts and, declined to certify common law causes of action and a class of umbrella purchasers.[23]

In *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.*, the Court of Appeal for Ontario directly grappled with the conflicting case law before rejecting the *Wakelam* decision:

> [T]here is no reason to depart from the reasoning of this court in *Apotex*, of the Manitoba Court of Appeal in *Westfair*, and of the Court of Appeal for British Columbia in *Watson*. There is nothing in the language of s. 36 or in the debates surrounding its enactment that suggests it was Parliament's intention to eliminate the use of a breach of Part VI of the Act as the unlawful means in a civil conspiracy claim. To the contrary, it would appear to be incongruous with the purpose of the Act, being the elimination of anti-competitive behaviour, that Parliament would eliminate a common law cause of action that serves to punish such behaviour.

The Court of Appeal described cases holding the contrary as "outliers" which "should not be followed". It observed that the application of *Wakelam* has been "severely restricted" because "the court took the wrong analytical approach".[24]

The Supreme Court of Canada, in *Pioneer Corp. v. Godfrey*,[25] conclusively addressed the issues of whether a certified class action may involve umbrella purchasers and whether common law claims may be pled along with

statutory claims under the *Competition Act*. In *Pioneer*, the proposed class action involved a conspiracy to ***fix prices*** in Optical Disc Drives ("ODDs"). Actions for both damages at common law and pursuant to the *Competition Act* were advanced including on behalf of purchasers of ODDs sold by non-conspirators (*i.e.*, umbrella purchasers). The Supreme Court began by noting that the CPA was procedural and did not create new causes of action. As such, whether umbrella purchasers had a cause of action was a matter of interpreting the relevant section of the *Competition Act*. After conducting a statutory analysis of s. 36(1) and 45(1) of the *Competition Act* and having regard to arguments of indeterminacy, the court concluded that umbrella purchasers do have a cause of action. The court then turned to the issue as to whether a plaintiff in a ***price fixing*** case had a right to sue for both common law and statutory damages. A statutory interpretation analysis was done to assess whether common law causes of action had been extinguished by the *Competition Act*. Relying on these principles of statutory interpretation, the Supreme Court held that Parliament, in creating statutory remedies under the *Competition Act*, had not intended to and did not extinguish common law and equitable claims, such as civil conspiracy, when it enacted statutory remedies in the *Competition Act*. Both issues were resolved by the application of statutory interpretation principles applicable to the *Competition Act* and not the *Class Proceeding Act*.

While not ***price-fixing*** conspiracy cases, some have argued that *Markson v. MBNA Canada Bank*[26] and *Cassano v. The Toronto Dominion Bank*,[27] represent a sea of change in the approach motions judges should take to certification.[28] In *Markson*, the Court of Appeal found that liability and entitlement to a remedy were sufficient to trigger the application of the aggregate assessment of damages section of the *Class Proceedings Act*.[29] Further, s. 24(1)(b) of the Ontario *Class Proceedings Act* which provides that the court may determine the aggregate or a part of a defendant's liability where the only questions of fact or law that remain to be determined concern assessment of monetary relief, is satisfied where potential liability can be established on a class-wide basis.[30] The Court of Appeal distinguished *Markson* from *Chadha v. Bayer*[31] on the basis that in *Markson* there was sufficient evidence that the allegedly illegal fees were passed through to the consumers and received by the defendant.[32] The Ontario Court of Appeal applied similar reasoning in *Cassano* and granted certification.

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It seems that the *Markson* and *Cassano* decisions have ushered in a more relaxed approach to class-wide damages for the purposes of certification in ***price-fixing*** cases. In *Irving Paper v. Atofina Chemicals*,[33] Justice Rady found that *Markson* and *Cassano* had overtaken *Chadha* and that it was not necessary to demonstrate damages on a class-wide basis. With respect to the damage calculation itself, she also held that, for certification, the court "need only be satisfied that a methodology may exist for the calculation of damages."

However, while refusing leave to appeal Justice Rady's certification decision, Justice Leitch held that there was no inconsistency between the *Markson/Cassano* principles and the *Chadha* decision. Justice Leitch noted that in *Markson* and *Cassano*, the plaintiffs did not face the same challenges as did the plaintiff in *Chadha* because the plaintiffs in both *Markson* and *Cassano* had a contractual relationship with the defendants. Due to the contract, once the defendants wrongdoing was proven, they would be liable for breach of contract without proof of consequential loss. Proof of breach of contract would create liability without the need to prove individual loss. In *Chadha*, on the other hand, the pleaded cause of action would not be complete without proof of loss. Such proof of loss would therefore be required in order for there to be potential liability to the class. Justice Leitch noted that this was also demonstrated by the fact that the Court of Appeal in *Markson* specifically confirmed *Chadha* and followed the principle from *Chadha* s. 24 of the *Class Proceedings Act* (the aggregate damage provision) "is applicable only once liability has been established and provides a method to assess a quantum of damages on a global basis but not the fact of damage." Similarly, in *Cassano,* proof of breach of contract created liability to all of the class members.[34]

However, Justice Leitch agreed with Justice Rady that the certification hearing is not an appropriate venue in which to carefully scrutinize and resolve conflicts between the evidence of experts. Accordingly, she held that the plaintiffs had shown a credible and plausible methodology to establish damages on a class wide basis.[35]

The Ontario Divisional Court came to a similar conclusion in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, overturning the motion judge's refusal to certify the action.[36] The court held that the necessary threshold of providing some basis in fact for the issue of determination of loss will be satisfied if the plaintiffs "present a proposed methodology by a qualified person whose assumptions stand up to the lay reader".[37] Further, at the certification stage, plaintiffs are not required to lead evidence to support the factual foundation of the proposed methodology. In addition, as was found in *Markson* and *Cassano*, the s. 24 aggregation provisions of the *Class Proceedings Act* were available to calculate damages on a class-wide basis.

In *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*,[38] the British Columbia Court of Appeal adopted a similar approach to that taken by Justice Rady in *Irving Paper*. The court held that the evidentiary bar for the plaintiff to show class-wide damages shall not be set too high on a certification motion. The Court noted that the opinion of the plaintiff's expert was necessarily preliminary, since the expert did not yet have access to discovery evidence. Accordingly, such expert evidence "should not be subjected to the exacting scrutiny required at a trial".[39]

This approach was confirmed by the Supreme Court of Canada in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*.[40] In that decision, the Court — with reference to the "some basis in fact" test utilized in determining whether the certification requirements have been met — held that plaintiffs must have a methodology that can establish that "the overcharge was passed on to the indirect purchasers, making the issue common to the class as whole". At the certification stage, plaintiffs need not prove the actual loss to the class, only "that there is a methodology capable of doing so." That expert methodology also must be "sufficiently credible or plausible to establish some basis in fact for the commonality requirement ... [it] must offer a realistic prospect of establishing loss on a class-wide basis".[41]

In *Jensen v. Samsung Electronics Co. Ltd.*, the Federal Court struck the plaintiffs' claim at certification, at the same time deciding that the plaintiffs had not shown some basis in fact for the alleged illegal agreement among the defendants.[42] The Federal Court of Appeal upheld the motion judge's decision.[43]

In a lengthy and well-reasoned decision, Justice Gascon highlighted the importance of proper pleadings in an alleged conspiracy case, and refused to allow the plaintiffs to avoid the rigours of pleadings standards by parroting the language of the *Competition Act* and relevant torts rather than pleading material facts. Justice Gascon added his voice to the judicial chorus endorsing the two-step test for proving some basis in fact for the common issues: the plaintiff must show some basis in fact that (a) the issue exists, and (b) it is common among the class members. In *Jensen*, Justice Gascon concluded that the plaintiffs had shown no basis in fact for an agreement among the defendants and refused to certify their case. The FCA "wholeheartedly" agreed with Justice Gascon's analysis.

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Section 36(4) of the *Competition Act*[44] creates a limitation period regime governing civil claims under s. 36 of the Act, subject to discoverability.

Footnote(s)

1 *Competition Act*, R.S.C. 1985, c. C-34. See *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2003] O.J. No. 4532 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*,[2001] O.J. No. 753 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.* (2001), Toronto 99-GD-46719 (Ont. S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2000] O.J. No. 1355, 48 O.R. (3d) 21 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2000] O.J. No. 41 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.* (4 December 2000), Toronto 00-CV-200462 (S.C.J.). See also: *Minnema v. Archer Daniels Midland Co.*, [2000] O.J. No. 1685 (S.C.J.).

2 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] S.C.J. No. 57, 2013 SCC 57; revg [2011] B.C.J. No. 688, 2011 BCCA 186.

3 *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013] S.C.J. No. 58, 2013 SCC 58; affg [2011] B.C.J. No. 689, 2011 BCCA 187.

4 *Infineon Technologies AG v. Option consommateurs*, [2013] S.C.J. No. 59, 2013 SCC 59; affg [2011] Q.J. No. 16769, 2011 QCCA 2116.

5 See: *Chadha v. Bayer Inc.*, [2001] O.J. No. 1844 (S.C.J.), affd [2003] O.J. No. 27 (Ont. C.A.); *Chadha v. Bayer Inc.*, [1999] O.J. No. 5466, 48 O.R. (3d) 415 (S.C.J.); *Chadha v. Bayer Inc.*, [1999] O.J. No. 3773, 45 O.R. (3d) 478 (S.C.J.); *Chadha v. Bayer Inc.*, [1999] O.J. No. 3621 (S.C.J.); *Chadha v. Bayer Inc.*, [1999] O.J. No. 2497, 45 O.R. (3d) 29 (S.C.J.); *Chadha v. Bayer Inc.*, [1998] O.J. No. 6419, 82 C.P.R. (3d) 202 (Gen. Div.).

6 *Illinois Brick Co. v. Illinois*, 97 S.Ct.2061 (1977); *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

7 *Chadha v. Bayer Inc.*, [2003] O.J. No. 27 (C.A.).

8 *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2001] O.J. No. 3682, 15 C.P.C. (5th) 76 (S.C.J.).

9 *Alfresh Beverages Canada Corp. v. Archier Daniels Midland Company*, [2001] O.J. No. 6028 (S.C.J.). Endorsement of Winkler J. *Alfresh Beverages Canada Corp. v. Hoechst AG et al.* (27 November 2001) Toronto 33817/99 (Ont. S.C.J.).

10 *Alfresh Beverages v. Hoechst Ag*, (27 November 2001) Toronto 33817/99 (Ont. S.C.J.).

11 *Bona Foods Ltd. v. Pfizer Inc.*, [2002] O.J. No. 5553 (S.C.J.).

12 *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [2014] B.C.J. No. 2548, 2014 BCSC 1936, at paras. 18-38.

13 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] S.C.J. No. 57, 2013 SCC 57; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, [2013] S.C.J. No. 58, 2013 SCC 58; and *Infineon Technologies AG v. Option consommateurs*, [2013] S.C.J. No. 59, 2013 SCC 59.

14 *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] S.C.J. No. 1, 2007 SCC 1.

15 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] S.C.J. No. 57, 2013 SCC 57, at paras. 115-18.

16 *Watson v. Bank of America Corp.*, [2014] B.C.J. No. 534, 2014 BCSC 532; revd in part [2015] B.C.J. No. 1775, 2015 BCCA 362.

17 *Wakelam v. Johnson & Johnson*, [2014] B.C.J. No. 167, 2014 BCCA 36; leave to appeal to S.C.C. dismissed.

18 *Watson v. Bank of America Corp.*, [2014] B.C.J. No. 534, 2014 BCSC 532, at para. 189; revd in part [2015] B.C.J. No. 1775, 2015 BCCA 362.

19 *Watson v. Bank of America Corp.*, [2015] B.C.J. No. 1775, 2015 BCCA 362, at para. 58.

20 *Fairhurst v. Anglo American PLC*, [2014] B.C.J. No. 2973, 2014 BCSC 2270.

21 *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, [2014] S.C.J. No. 12, [2014] 1 S.C.R. 177, 2014 SCC 12.

22 *Fairhurst v. Anglo American PLC*, [2014] B.C.J. No. 2973, 2014 BCSC 2270, at para. 15.

23 *Shah v. LG Chem Ltd.*, [2015] O.J. No. 5168, 2015 ONSC 6148. See also *Ewert v. Nippon Yusen Kabushiki Kaisha*, [2019] B.C.J. No. 945, 2019 BCCA 187.

24 *Fanshawe College of Applied Arts and Technology v. AU Optronics Corp.*, [2016] O.J. No. 4297, 2016 ONCA 621, at paras. 83-92.

25 *Pioneer Corp. v. Godfrey*, [2019] S.C.J. No. 42, 2019 SCC 42.

26 *Markson v. MBNA Canada Bank*, [2007] O.J. No. 1684, 2007 ONCA 334, 85 O.R. (3d) 321; leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 346.

27 *Cassano v. Toronto Dominion Bank*, [2007] O.J. No. 4406, 47 C.P.C. (6th) 209 (C.A.); leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 15. See *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2009] O.J. No. 4021, at paras. 65, 116, 118 (S.C.J.).

28 See *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2009] O.J. No. 4021, at paras. 65, 116 and 118 (S.C.J.).

29 *Markson v. MBNA Canada Bank*, [2007] O.J. No. 1684, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 41; leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 346.

30 *Markson v. MBNA Canada Bank*, [2007] O.J. No. 1684, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 48; leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 346.

31 *Chadha v. Bayer Inc.*, [2003] O.J. No. 27 (C.A.).

32 *Markson v. MBNA Canada Bank*, [2007] O.J. No. 1684, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 55; leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 346.

33 *Irving Paper v. Atofina Chemicals*, [2009] O.J. No. 4021, 99 O.R. (3d) 358 (S.C.J.); leave to appeal refused [2010] O.J. No. 2472 (S.C.J.).

34 *Cassano v. Toronto Dominion Bank*, [2007] O.J. No. 4406, 47 C.P.C. (6th) 209 (C.A.); leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 15. See *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2009] O.J. No. 4021 (S.C.J.) at paras. 65, 116, 118; leave to appeal refused, [2010] O.J. No. 2472 (S.C.J.).

35 But see Justice Leitch's statement in *Irving Paper v. Atofina Chemicals*, [2010] O.J. No. 2472, 2010 ONSC 2705 (S.C.J.). While refusing to grant leave to appeal Justice Rady's decision, Justice Leitch held that there must be evidence to prove class-wide loss. As the plaintiff has produced evidence on class-wide harm and a method of how to assess damages, Justice Leitch held that the plaintiffs had met the evidentiary burden in relation to the certification requirement of commodity and preferrability.

36 *2038724 Ontario Ltd v. Quizno's Canada Restaurant Corporation*, [2009] O.J. No. 1874, 96 O.R. (3d) 252 (Div. Ct.); affd [2010] O.J. No. 2683 (C.A.).

37 *2038724 Ontario Ltd v. Quizno's Canada Restaurant Corporation*, [2009] O.J. No. 1874, 96 O.R. (3d) 252 (Div. Ct.); affd [2010] O.J. No. 2683, at para. 102 (C.A.).

38 *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [2009] B.C.J. No. 2239 (C.A.); leave to appeal denied [2010] S.C.C.A. No. 32. See also *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, where the Supreme Court of Canada certified the indirect purchaser class action in which the plaintiff alleged that Microsoft engaged in various forms of anti-competitive conduct, thereby increasing the price charged to class members for its application software and operating systems. The court held that to hold the expert methodology to the robust or rigorous standard utilized in certain American cases would be inappropriate at the certification stage.

39 *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [2009] B.C.J. No. 2239 (C.A.); leave to appeal denied [2010] S.C.C.A. No. 32, at para. 66.

40 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] S.C.J. No. 57, 2013 SCC 57.

41 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] S.C.J. No. 57, 2013 SCC 57, at paras. 115-18.

42 *Jensen v. Samsung Electronics Co*., [2021] F.C.J. No. 1847, 2021 FC 1185.

43 [2023] F.C.J. No. 552, 2023 FCA 89.

44 R.S.C. 1985, c. C-34.

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