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2008 CanLII 23490 (ON S.C.D.C.)

SUPERIOR COURT OF JUSTICE - ONTARIO
DIVISIONAL COURT - TORONTO

RE: Axiom Plastics Inc. v. E.I. DuPont Canada Company

BEFORE: Kiteley J.

COUNSEL: Joseph M. Steiner, Christopher P. Naudie, Vaso Maric, for the defendant/appellant

Thomas G. Heintzman, Jonathan C. Lisus, Sarah W. Corman and David Sterns, for the plaintiff/cross-appellant

HEARD: March 12 and 13, 2008

E N D O R S E M E N T

[1] In reasons for decision dated August 27, 2007[1] (incorporated into an order dated December 4, 2007), Hoy J. certified this action as a class action[2] in respect of DuPont Canada's pricing and distribution arrangements with its three authorized distributors. DuPont Canada seeks leave to appeal that order. Axiom also seeks leave to appeal on the basis that the definition of the class and the consequential common issues are not sufficiently comprehensive. In both motions, counsel relied on rule 62.02(2)(a) and (b).[3]

[2] For reasons that follow, both motions are dismissed.

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[1] *Axiom Plastics Inc. v. E.I. DuPont Canada Co.,* [2007] O.J. No. 3327; 87 O.R. (3d) 352 (S.C.J.) [*Axiom Plastics*].
[2] Pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 as amended [*CPA*].
[3] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Background

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[3] The statement of claim alleges that DuPont, through vertical conspiracies with its distributors and certain "Tier 1" manufacturers in the automotive industry, unlawfully fixed the prices of the engineering resins it produced for use in automotive parts.

[4] The automotive industry consists of the original equipment manufacturer ("OEM") at the top and several "tiers" of manufacturers below. Tier 1 manufacturers supply parts and assemblies directly to OEMs. Tier 2 manufacturers supply automotive parts to Tier 1 manufacturers for incorporation into the products the Tier 1 manufacturers supply to the OEMs. Tier 3 manufacturers supply parts to Tier 2 manufacturers for use in the parts supplied to the Tier 1 suppliers. Axiom was principally a Tier 2 manufacturer during the period in question.

[5] DuPont manufactures several types of engineering resins used in automotive parts, as well as non-automotive applications. DuPont sells the engineering resins in Canada directly, and through its three distributors.

[6] Axiom pleaded two types of conspiracies, the "Credit Upon Proof of Sale" system ("CUPS") and the Tier 1 Agreement conspiracies. In the case of the CUPS system alleged conspiracy, Axiom argued that the economic effect was that the distributor was compelled to sell resins to moulders at not less than the list price unless DuPont agreed.

[7] In the case of the Tier 1 Agreements, DuPont has entered into agreements with a number of Tier 1 manufacturers that provide financial incentives to Tier 1 manufacturers. These Tier 1 manufacturers agree to use DuPont resins and agree to require Tier 2 manufacturers to use DuPont resins. These agreements provide for rebates to the Tier 1 manufacturer. DuPont will rebate to the Tier 1 manufacturer a portion of the purchase price paid to DuPont or one of its three authorized distributors by the Tier 1 manufacturer's moulders. Most of these agreements prohibit the disclosure of the rebate arrangement to the Tier 2 manufacturer. While Axiom argued that this agreement constituted a conspiracy, DuPont characterized it as a "preferential pricing" arrangement.

[8] The proposed class included persons who purchased resins directly from DuPont, and not just persons who acquired resins through one of its authorized distributors. Except for specifically excluded entities, it also included persons at

all tiers of the automotive supply chain, including significant Tier 1 manufacturers who negotiated supply agreements with DuPont, and not just moulders or other Tier 2 manufacturers who were the subject of the Tier 1 Agreements, or that purchased from an authorized distributor. The proposed class also included persons such as Axiom who were required by their Tier 1 customers to use only DuPont resins, and others, likely Tier 1 manufacturers, who could select which resin to use.

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Reasons for Decision of the Motion Judge

[9] The motion judge concluded[4] that it was not plain and obvious that a claim for damages under section 36 of the *Competition Act,*[5] founded on a breach of section 45(1) or 61 of the *Act,* or that the claims in civil conspiracy and unjust enrichment could not succeed. She held that the requirement of section 5(1)(a) of the *CPA* had been satisfied. There is no appeal from that finding.

[10] The motion judge adopted the proposed class with an important modification. She narrowed the class by restricting it to purchasers required by a customer to use only engineering resins manufactured by DuPont or its authorized distributors excluding three named distributors. The relevant part of the class definition is as follows:

> All purchasers in Canada between January 2000 and [date of certification] of engineering resins for an automotive application from . . . DuPont . . . or its authorized Canadian distributors, who were required by a customer to use only engineering resins manufactured by DuPont in the automotive application, excluding. . . Magna International Inc., Multimac Inc., Omron Dual Tech Automotive Electronics Inc., PolyOne Canada Inc., DuPont or its authorized Canadian distributors.

[11] Axiom had argued that the relevant Tier 1 Agreements involving the three distributors listed in the exclusion ought to be included in the definition of class. The motion judge identified the reasons why the Tier 1 Agreements should

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[4] *Axiom Plastics, supra*, note 1, at para. 22.
[5] *Competition Act*, R.S.C. 1985, (2nd Supp.) c. C-34 [*Act*].

be excluded. She observed that the CUPS system was at the heart of the plaintiff's case. The motion judge established the common issues as follows:

(a) For purposes of this paragraph of the Order, "CUPS System" means DuPont Canada's arrangements with its distributors whereby, when a distributor supplies resins to a customer whom DuPont Canada has agreed shall be entitled to acquire resins at a price less than DuPont Canada's list price or who asks the distributor for a price less than DuPont Canada's list price, a distributor may ask DuPont Canada to reduce the price paid by the distributor in the first instance, and if DuPont Canada agrees, then, after the distributor completes the sale to its customer, DuPont Canada provides a credit to its distributor referred to as a "Credit Upon Proof of Sale";

(b) During the Class Period, did DuPont Canada, by way of its "CUPS system", conspire, combine, agree or arrange with DuPont Canada's authorized distributors to enhance unreasonably the price of engineering resins charged to members of the Class (the "Class Members"), contrary to s. 45(1)(b) of the *Competition Act*?

(c) During the Class Period, did DuPont Canada, by way of its "CUPS system", conspire, combine, agree or arrange with DuPont Canada's authorized distributors to prevent or lessen, unduly, competition in the sale or supply of engineering resins to Class Members, contrary to s. 45(1)(c) of the *Competition Act*?

(d) During the Class Period, did DuPont Canada, by way of its "CUPS system", conspire, combine, agree or arrange with DuPont Canada's authorized distributors to otherwise restrain or injure competition unduly contrary to s. 45(1)(d) of the *Competition Act*?

(e) During the Class Period, did DuPont Canada, by way of its "CUPS system", directly or indirectly enter into agreements and/or engage in other conduct and practices to attempt to influence upward, or to discourage the reduction of prices at which engineering resins are sold, supplied or offered to be supplied, to Class Members, contrary to s. 61(1) of the *Competition Act*?

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(f) During the Class Period, did DuPont Canada, by way of its “CUPS system”, enter into a tortious conspiracy with DuPont Canada’s Canadian distributors?

(g) If so, is the defendant liable for damages and how are such damages to be computed?

(h) During the Class Period, was DuPont Canada enriched and did the Class Members suffer a corresponding deprivation by way of its “CUPS system”, and was there any juristic reason or justification for the defendant’s enrichment?

(i) If so, what restitutionary payment should be made by DuPont Canada to the Class Members, and how is such restitutionary payment to be computed?

(j) Should the Court award an aggregate assessment of monetary relief on behalf of some or all Class Members? If so, what is the amount of the aggregate assessment and how should the Class Members share in the award?

(k) Does the conduct of DuPont Canada justify an award of exemplary or punitive damages? If so, what amount of punitive damages is to be awarded?

[12] Having defined the class and the common issues without reference to the Tier 1 manufacturers, Hoy J. was satisfied that a class action would be a fair, efficient and manageable method of advancing Axiom’s claims. Indeed, she observed that it would not be efficient or manageable if the three Tier 1 manufacturers were included.[6] Furthermore, she held the individual actions would be a more efficient and manageable way of advancing the claims in relation to the Tier 1 Agreements.

Appeal by DuPont Canada

[13] DuPont Canada takes issue with the following aspects of the decision. First, that the class as defined ought not to include direct purchasers from DuPont

[6] *Axiom Plastics, supra,* note 1 at para. 169.

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Canada. Second, that there is no common issue of conspiracy under s. 45, no common issue of price maintenance under s. 61, and no common issue in respect of loss or liability. Third, a class action is not the preferable procedure.

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[14] DuPont asked that leave be granted on the following issues:

(a) Does the inclusion of direct purchasers of resins from DuPont Canada in the definition of the class comply with s. 5(1)(b) of the *CPA*?

(b) Is there a common issue in respect of whether DuPont Canada engaged in conduct contrary to s. 45(1) of the *Act*?

(c) Is there a common issue in respect of whether DuPont Canada engaged in conduct contrary to s. 61 of the *Act*?

(d) Is there a common issue of loss and liability in respect of whether DuPont Canada is liable to the class members under s. 36 of the *Act,* under the tort of conspiracy, or for unjust enrichment?

(e) In light of these findings, is there a common issue in respect of Axiom's claims in tort or for unjust enrichment?

(f) In light of these findings, is a class action the preferable procedure?

[15] DuPont asserted that it was seeking leave to appeal in respect of specific aspects of the order that are in clear conflict with the decision of *Chadha v Bayer Inc.*[7] and other authorities, and that some aspects are wholly unsupported by the evidence and were subject to minimal analysis by the motion judge.

[16] In its factum in response to DuPont's motion for leave, the plaintiff asserted that the essence of the decision was a discretionary, fact-based finding that the class members' claims raised common issues, that the anti-competitive effects of the defendant's arrangements could be determined on a common basis, and that a class proceeding is the preferable procedure to determine those claims. The plaintiff argued that defendants in price-fixing conspiracy cases always seek to

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[7] (2003), 63 O.R. (3d) 22 (C.A.), aff'g (2001), 200 D.L.R. (4th) 309 (Ont. Div.Ct.) [*Chadha*].

cloud the central fact of the conspiracy with a plethora of alleged intervening events, actors, and damage issues. But at the certification stage, the only question is whether the form of the action is suitable for trial in a class action. This is a discretionary, interlocutory, and procedural question. Counsel argued that rule 62 does not contemplate a whole scale review on appeal of the decision and the factual basis upon which it rests.

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Appeal by Axiom

[17] Axiom asserted that the definition of class (and correspondingly the common issues) ought to include the Tier 1 Agreements.

[18] Axiom asserted that the motion judge:

(a) erred in drawing conclusions about the merits of the claim in restricting the common issues;

(b) erred in finding that the issues relating to the Tier 1 Agreements are not common issues and could not be adequately and preferably resolved in a common issues trial, particularly one containing the common issues which were certified;

(c) erred in finding that individual issues relating to the Tier 1 Agreements precluded claims related to those agreements from being common issues within the class proceedings; and

(d) erred in deleting common issues relating to the statutory and common law conspiracy and price maintenance claims asserted by the plaintiff which were otherwise certified as common issues.

[19] In its factum in response to Axiom's motion for leave, the defendant observed that the motion judge had conducted an extensive review of the terms of the Tier 1 Agreements, and she noted the several ways in which they varied. DuPont asserted that in light of these factual findings, the motion judge determined that it was not possible to ascertain on a class-wide basis whether the various Tier 1 Agreements constituted agreements to "unduly" lessen competition and/or "unreasonably" enhance prices in respect of over 200 distinct resin products. For these and other reasons, the Tier 1 Agreements were excluded from the definition of class.

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Leave to Appeal

[20] Rule 62.02(4) provides that leave 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 matters of such importance that, in his or her opinion, leave to appeal should be granted.

Disposition of the Motions for Leave to Appeal

[21] As counsel for the plaintiff pointed out, an appellate decision does not amount to a conflicting decision. Another appellate decision should be dealt with under rule 62.02(4)(b).[8] If the different result is because of different circumstances, the requirement of "conflicting decisions" is not met.[9] Conflicting decisions must be in conflict as to what they actually ordered. The appeal is from the order, not from the reasons.[10]

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[8] *Nantais v. Telectronics Proprietary (Canada) Ltd*. (1995) 129 D.L.R. (4th) 110 at pp. 111-112 (Ont. Ct. J. (Gen. Div.).

[9] *Comtrade Petroleum Inc. v. 490300 Ontario Ltd*. (1992) 7 O.R. (3d) 542 at p. 544 (Ct. J. (Gen. Div.); *Pearson v. Inco Ltd*., [2002] O.J. No. 2134 at paras. 7 – 9 (S.C.J.) [*Pearson*].

[10] *Pearson, supra*, note 9, at para. 12.

[22] Neither party needs to show that the motion judge was wrong or even probably wrong. The test is whether the decision is open to serious debate.[11]

[23] Counsel agree that this motion judge has considerable experience in class proceedings and is entitled to deference.[12]

[24] I observe with respect to both motions, that, in the course of 1.5 days, each party sought to re-argue the motion for certification that had been heard by the motion judge over three days. In support of each motion for leave to appeal, the moving party sought to identify errors made or reasons to doubt the correctness of the decision or conflict with other decisions. In each motion for leave to appeal, the moving party referred extensively to the evidence and the facts found by the moving judge.

[25] As is apparent from paragraphs 16 and 19 above, each party used the fact-based, discretionary nature of the motion judge's task as a shield when it suited that party to resist the opponent's motion for leave to appeal. Each party then tried to rationalize why its motion for leave to appeal was not a challenge to the fact-based discretionary findings by the motion judge. Indeed, counsel for the plaintiff argued that the essential difference between the motions for leave was that the defendant challenged the findings of fact while the plaintiff accepted the findings of fact but argued that they led to different conclusions. In this case, that is a distinction without a difference.

[26] In 37 pages (191 paragraphs), the motion judge scrupulously examined all of the issues. For each issue, she summarized the position taken by the party, considered the case law, and explained how she arrived at her decision. The reasons contain an extensive, detailed, and nuanced analysis in which the appropriate principles were considered. The decision reflects the application of well-known principles to the facts. Simply because counsel disagree with her discretionary application of those principles to the facts does not mean that the motion judge's decision is in conflict with another decision or that there is good reason to doubt its correctness.

[27] Because of this global approach I take, and because the case ought to move forward to the next phase, I will not deal with the very detailed submissions made by counsel on behalf of each appellant. The two issues that generated the

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[11] *1176560 Ontario Ltd. v. Great Atlantic and Pacific Co. of Canada*, [2003] O.J. No. 1089 at para. 39 (Div. Ct.).
[12] *Cassano v. Toronto-Dominion Bank*, [2007] O.J. No. 4406 at para. 23 (C.A.).

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most interest on the motions for leave to appeal were the definition of class and whether loss and liability constituted a common issue.

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Definition of Class

[28] The decision by the motion judge as to the definition of the class, and its consequential effect on the common issues, is challenged by both appellants. The plaintiff says the definition is not broad enough while the defendant says it is too broad.

Axiom's Cross-Appeal on Class

[29] The thrust of Axiom's claim is that DuPont has used two interrelated devices to unlawfully maintain and enhance prices: the CUPS system and the Tier 1 Agreements. The plaintiff alleges that through both of these systems, DuPont fixed and maintained the price of DuPont resins to members of the proposed class.

[30] In its cross-appeal, counsel for the plaintiff argued that the exclusion of the Tier 1 Agreements is in conflict with other decisions in this province, and there is good reason to doubt its correctness for two reasons. First, counsel for the plaintiff argued that the facts and legal issues relating to the Tier 1 Agreements are interrelated to those in respect of the issues that were certified and that the two alleged conspiracies are all "part and parcel" of the same device to unlawfully maintain and enhance prices. Counsel asserted that the motion judge failed to consider the strong policy reasons for addressing the Tier 1 Agreements within the class action, and to address them as individual issues to the extent necessary within that action.

[31] Second, counsel for the plaintiff argued that the motion judge erred in focusing on those aspects of the claim that might require individual determination instead of focusing on those parts of the claim that are common to class members. Counsel asserted that the motion judge incorrectly engaged in a merits-based hypothetical inquiry as to how the elements might have influenced the class members' behaviour, when that inquiry was contrary to the pleadings and the evidence on the motion.

[32] Counsel for the plaintiff relied on *3218520 Canada Inc. v Bre-X Minerals Ltd. et al.*[13] where the Court of Appeal allowed an appeal from an order certifying a claim for fraudulent misrepresentation but not a claim for negligent misrepresentation. After observing that there was no principled basis for differentiating the torts as the motion judge had done, the Court of Appeal held that there was sufficient overlap in the legal claims grounded in fraudulent misrepresentation and negligent misrepresentation to justify certification.[14]

[33] Counsel for the plaintiff argued that the motion judge had not instructed herself on the principles in *Bre-X* and had failed to apply those principles.

[34] The decision in *Bre-X* is not in conflict. While the *causes of action* alleged against the Tier 1 distributors and the CUPS system distributors are the same, Hoy J. identified the differences in the factual underpinnings between them. While the Court of Appeal in *Bre-X* held that as many issues as possible ought to be certified,[15] that observation rested on its earlier conclusion that there was overlap. Furthermore, while *Bre-X* is not referred to in the reasons, counsel agree that the case was in the factum, that the particular point on which it is now argued the motion judge did not instruct herself was not advanced before her, and in any event, she referred extensively to *Chadha* which followed and approved *Bre-X*.

[35] Counsel for the plaintiff also asserted that portions of the decision are contrary to the principle articulated by the Court of Appeal in *Cloud v. Canada (Attorney General)*[16] that the motion judge ought not to delve into the merits:

> Hollick also makes clear that this does not entail any assessment of the merits at the certification stage. Indeed, on 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 and issue.

[36] The motion judge was required to examine the documents and evidence that were contained in the voluminous motion records. She was alive to her task, namely to identify "some basis in fact" for compliance with s. 5. I am not

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[13] (2000) 51 O.R. (3d) 236 (C.A.) [*Bre-X*].
[14] *Ibid*, at para. 44.
[15] *Ibid,* at para. 56.
[16] (2005), 73 O.R. (3d) 401 at para. 50 (C.A.) [*Cloud*].

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persuaded that she engaged in a “finely calibrated assessment” of evidentiary weight.

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[37] I agree with counsel for DuPont that, having conducted an extensive review of the documentation including the Tier 1 Agreements, there is no reason to doubt the correctness of the decision of the motion judge that the Tier 1 distributors ought not to be included. Her decision is not open to serious debate. There is no conflict in law.

Dupont’s Appeal on Class

[38] In its appeal, DuPont also challenged the definition of class. Counsel for DuPont argued that the definition is overly broad in that it includes direct purchasers of DuPont while it should be limited to customers of DuPont distributors. DuPont argued that there is good and serious reason to doubt the correctness of the order for two reasons: a direct purchaser, by definition, does not make purchases through a distributor and falls outside the distribution arrangements reflected in the “CUPS system” and a direct purchaser from DuPont Canada has no claim for conspiracy or for unlawful retail price maintenance under the *Act.*

[39] I disagree. It appears that DuPont made this same submission to the motion judge.[17] Simply because she did not accept the submission does not mean that her decision is open to serious debate. She found the facts to the extent necessary. She applied the law to those facts.[18]

[40] Counsel for the defendant also argued that the decision was in conflict with authorities under the *CPA*[19] and under the *Act*.[20] Furthermore, counsel noted in the factum that they had not found any reported decision in Canada which has held that a direct purchaser has a claim for resale price maintenance against a manufacturer where there is no distributor or dealer involved in the sale.

[41] DuPont’s arguments appear to be predicated on whether the claims will ultimately be successful. Hoy J. found only that there was some basis in fact that the class should be defined to include DuPont. There are no decisions in

[17] *Ibid*, at para.67
[18] *Ibid,* at para. 61-62
[19] Including *Mouhteros v. DeVry Canada Inc*. (1998), 41 O.R. (3d) 63 (Gen. Div.).
[20] Including *Atlantic Sugar Refineries Co. v. Canada (Attorney General),* [1980] 2 S.C.R. 644; *DuPont Canada Inc. v. Dennis*, [1993] O.J. No. 1563, at para. 20 (Gen.Div.); *R. v. Les Must de Cartier Canada Inc*. (1989), 45 B.L.R. 167 at pp. 171-72 (Ont.Dist.Ct.); *R. v. Phillips Electronics Ltd*. (1980), 30 O.R. (2d) 129 at p. 134 (C.A.).

conflict with her decision. I am not persuaded that there is good reason to doubt the correctness of her decision as to the definition of the class. Her decision is not open to serious debate.

[42] I dismiss the motions to grant leave to appeal by the plaintiff to enlarge the class and by the defendant to restrict it.

Common Issues: Loss and Liability

[43] Having concluded under s.5(1)(a) that it was not plain and obvious that a claim for damages under s. 36 of the *Act*, founded on a breach of s. 45(1) or 61 of the *Act*, or that the claims in civil conspiracy and unjust enrichment could not succeed, and having defined the class without reference to Tier 1 agreements, the motion judge went on to examine the common issues under s. 5(1)(c). She referred to the definition of "common issues", the test to be applied,[21] and the instruction by the Court of Appeal that the test establishes a low bar.[22]

[44] Counsel for the defendant sought leave with respect to most of the common issues. However, submissions focused on whether there was a common issue of loss and liability and hence I begin there.

[45] Counsel for the defendant argued that the decision of the motion judge is in conflict with four authorities. First, counsel for the defendant asserted that the plaintiff had failed to provide the evidence required by the Court of Appeal in *Chadha v. Bayer*[23] to establish that loss and liability could be proven on a class-wide basis and thus the decision of the motion judge was in conflict with *Chadha*.

[46] In *Chadha,* it was alleged that the defendants (manufacturers and suppliers) engaged in a price-fixing scheme, thereby illegally increasing the price of concrete bricks and paving stones coloured by iron oxide pigment. As the Court of Appeal observed,[24] the issue turned on the efficacy and method of proof of whether all of the estimated 1.1 million indirect purchasers of the defendant's product overpaid for their homes as a result, and thereby suffered damage.

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[21] *Hollick v. City of Toronto,* (2001), 205 D.L.R. (4th) 19 at para. 18 (S.C.C.).
[22] *Cloud, supra,* note 16, at para. 53.
[23] *Supra,* note 7.
[24] *Supra*, note 7, at para. 3.

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[47] The Court of Appeal reviewed the motion judge's finding as to the conflicting expert evidence from economists on the effect of a price increase at the manufacturing stage on the ultimate consumer of the product. The Court of Appeal noted that:

> . . . it is only on the basis of that (expert) 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.[25]

[48] The Court of Appeal noted the deficiencies in the expert evidence:

> That evidence does not address the issue of what method could be used at a trial to prove that all end-purchasers of buildings constructed using some bricks or paving stones that contain the respondents' iron oxide pigment overpaid for the buildings as a result. Rather, 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. He made it clear that he did not know how willing end-purchasers would be to pay higher costs and that he had not had sufficient time to do any analysis to determine the response of the marketplace. He then went on to postulate a conceptual model for calculating the damages "to the extent that buyers of homes or other buildings made of construction materials using iron oxide pigment incur the damages of the conspiracy". 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.

[49] And further at para. 40:

> In this case, the appellants presented no evidence from industry representatives to explain how the manufacturers and distributors

[25] *Chadha, supra,* note 7, at para. 28.

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> of bricks and the developers of new home price their products, and in particular, whether there is a direct pass-through of the price of every component into the sale price of all homes, the relevance of the value of the land component, and how other factors such as the real estate market and the individual bargaining of the purchaser and vendor affect the price. The evidence on the issue of loss to the members of the plaintiff class came only from the affidavit of an expert economist who did not address those issues. In his affidavit, the expert does not suggest that he consulted any industry records or other data which would substantiate a pass-through analysis.

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[50] Counsel for the defendant argued that the evidence adduced by the plaintiffs did not address the issue of loss; that, in the absence of such evidence, the motion judge wrongly made assumptions based on "basic economic principles"; and that the motion judge had erred in failing to apply the appropriate standard of evidence necessary to find that loss and liability was a common issue.

[51] I disagree. In her analysis, the motion judge correctly identified the issue.[26] She considered the authorities on which counsel for DuPont had relied. She noted[27] 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*.[28] 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

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[26] *Axiom Plastics*, *supra,* note 1, at para. 117.
[27] *Ibid,* at para. 122
[28] *Ibid,* at para. 131

to which counsel also referred in this motion for leave. She made key findings in the analysis and conclusion section.[29]

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[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*.

[55] The second case that counsel argued is in conflict is *Price* v. *Panasonic Canada Inc*.[30] where an action was brought on behalf of 200 million end purchasers who alleged unlawful price maintenance in the resale of audio-visual products. The motion judge considered and rejected DuPont's submissions on *Price.*[31] That decision is not in conflict with hers. Nor does *Price* mean that the decision of the motion judge is open to serious debate.

[56] Counsel for DuPont referred to two other decisions to which reference was not made in submissions to the motion judge. *Harmegnies v. Toyota Canada*[32] was released by the Quebec Court of Appeal after the decision in the case before me. Without analyzing the differences arising from a claim in the context of the Quebec Civil Code on behalf of 37000 retail purchasers against Toyota and 38 car dealers in the Montreal area, I am not prepared to find that that decision is in conflict.

[57] The fourth decision on which counsel for DuPont relied is the recent decision in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp*.[33] where the claim was asserted on behalf of direct purchasers who allegedly had no choice but to purchase supplies as designated by the franchisor. The plaintiffs alleged that franchisees had been the victims of the tort of conspiracy, the effect of which was to maintain prices contrary to s. 61 of the *Act*.

[58] The plaintiffs relied on the evidence of an economist who provided three methodologies for extrapolating "but for" prices on a class-wide basis. Perell J. accepted the criticism of that evidence for the reasons he explained and he rejected that evidence.[34] Based on the description of the evidence and the critique, the rejected evidence is similar to the evidence that was led and relied on by the motion judge to make a finding that loss and liability were common issues. The

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[29] *Ibid*, at paras. 123-150.
[30] (2002), 22 C.P.C. (5th) 379 (Ont. S.C.J.)
[31] *Axiom Plastics*, *supra,* note 1, at paras. 133-134.
[32] [2007] Q.J. 1072 (S.C.J..); aff'd by Quebec Court of Appeal on February 26, 2008.
[33] [2008] O.J. No. 833 (S.C.J.).
[34] *Ibid,* at paras. 112 – 114.

apparent similarity of expert evidence which was rejected in *Quizno's Canada* but relied on in this case, does not mean the cases are in conflict. Rather, they were based on different facts and analyses. Indeed, there is no mention by Perell J. that there is a "standard of evidence". He referred to the decision of Hoy J. in this case on the distinction she made amongst the proposed class members. His reasons make no reference to the analysis nor the conclusions she reached on the common issues of loss and liability. I infer that if he were taking an approach different from Hoy J., he would have said so.

[59] I am not persuaded that any of those four decisions are in conflict. Indeed as counsel for DuPont conceded in reply on its motion for leave to appeal, the motion judge referred to all the right principles. DuPont takes issue with the application of those principles. I am not persuaded that there is reason to doubt the correctness of the finding of the motion judge that there was some basis in fact that the issues of loss and liability were common issues. Her decision is not open to serious debate. I dismiss the motion for leave to appeal on common issues of loss and liability.

Other common issues: Anti-competitive conduct under s. 45 and s.61

[60] DuPont argued that there is no common issue of conspiracy under s. 45 in that the likely effect of the CUPS system conspiracies and the common issue of "undueness" cannot be determined on a class-wide basis. DuPont also asserted that there is no common issue of price maintenance under s. 61.

[61] As indicated above, the focus of submissions was on the definition of the class and on the common issues of loss and liability. Having disposed of those, I will not review these submissions in detail. Suffice it to say that I am not satisfied that there are any decisions in conflict. Nor am I persuaded that the decisions made by the motion judge on these issues are open to serious debate.

Preferable Procedure

[62] At paragraph 91 of the factum, counsel for DuPont pointed out that the motion judge's conclusions under s. 5(1)(d) were wholly dependent on the

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scope of common issues. Having dismissed the motion for leave to appeal with respect to the common issues, it follows that the motion for leave on preferable procedure ought also to be dismissed.

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Desirable that Leave be Granted/Appeal Involves Matters of Such Importance

[63] Since I am not persuaded to grant leave under either of the first two branches of rule 62.02(4)(a) or (b), I need not deal with the second branch of each rule. However, in view of the submissions by counsel, I will do so briefly.

[64] The irony of the necessity to take inconsistent positions in support of and in opposition to the motions is manifested in the submissions as to the desirability of granting leave and whether the appeal and cross-appeal involve matters of such importance that leave should be granted. In support of its appeal, counsel for DuPont argued that the issue of price fixing is vexing; that the four authorities address the evidence needed in price fixing cases; and that therefore these issues concern matters of broad importance. He asserted that the decision of the motion judge causes confusion and it is desirable that there be clarification as to what evidence is necessary to establish common issues of loss and liability. In opposition to that motion, counsel for the plaintiff asserted that it involved a discretionary decision as to whether there was “some basis in fact” and, as such, the decision with respect to the definition of class was unimportant jurisprudentially. Furthermore, he argued that the Divisional Court ought not to engage in a review of whether the motion judge erred in finding “some basis in fact” for the application of s. 5(1)(b). The converse was articulated in the cross-appeal.

[65] During submissions, it was noted that this is the first case where an alleged vertical price fixing scheme involving direct purchasers had been certified that was not on consent. Uniqueness alone does not mean that leave ought to be granted. In the absence of a reason to doubt correctness or a conflict within the meaning of the Rule, the fact that a cause of action is certified for the first time does not encourage the granting of leave. Indeed, arguably, the more quickly the matter progresses, the sooner jurisprudence will be developed that will address the circumstances in which such allegations are ultimately successful or not.

[66] Had I been satisfied that the first branch of rule 62.02(4)(a) or (b) was met, I would not have been satisfied on the second branch of either rule.

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ORDER TO GO

[67] The motions for leave to appeal by the defendant and by the plaintiff are dismissed. If by June 2nd, counsel are unable to agree as to costs, then submissions as to *entitlement* will be made on the following timetable: counsel for the defendant by June 16th; counsel for the plaintiff by June 30th. If costs are awarded, submissions as to the amount of costs will be directed.

ADDENDUM

[68] As I was about to release these reasons, I received from counsel on consent a copy of the reasons for decision in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG et al*[35] in which the applications judge declined to certify a proposed class action under the *British Columbia Class Proceedings Act*.

[69] I do not consider it necessary to call on counsel for further submissions. I have reviewed the reasons, focusing on those parts dealing with the definition of class and the common issues of loss and liability.

[70] The application judge heard submissions over seven days that obviously addressed a significant evidentiary record. The analysis of the definition of class is not of assistance in this motion for leave because of the focus on indirect purchasers. The analysis of whether there were common issues of loss and liability is of more interest, partly because the evidence of Ms. Sanderson on behalf of the plaintiff on the issue of methodology was accepted and relied on by Hoy J.; while, in *Pro-Sys,* Masuhara J. accepted her evidence on behalf of the defendants and relied upon her critique of the plaintiff's evidence on methodology. I note that in *Pro-Sys* there was no discussion about the "standards of evidence" that was a focus in this leave to appeal motion.

[71] The different approaches to the evidence of Ms. Sanderson is indicative of the different evidentiary record, different findings of fact, different analyses and different outcomes on the issues of loss and liability. That does not mean that there is conflict within the meaning of rule 62.02(4)(a) between the decisions made in *Pro-Sys* and in the case before me.

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[35] 2008 BCSC 575, 2008 CarswellBC 943 (S.C.).

[72] As indicated above, Hoy J. made decisions on each of the criteria in s. 5(1) of the *CPA* that were fact-driven, discretionary, and nuanced. Her decision reflects the identification of the proper legal principles and her application of the facts as she found them to the law. There is nothing in the reasons for decision in *Pro-Sys* that leads me to the conclusion that there is reason to doubt the correctness of her decision.

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Kiteley J.

DATE: May 16, 2008

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