COURT FILE NO.: 05-CV-302358 CP
DATE: 20070827

2007 CanLII 36817 (ON S.C.)

B E T W E E N:

AXIOM PLASTICS INC.

Plaintiffs

- and -

E.I. DUPONT CANADA COMPANY

Defendants

REASONS FOR DECISION

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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
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Plaintiffs	)	
	)	**Thomas G. Heintzman, Q.C.** and
	)	**Jonathan C. Lisus**, for counsel for
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	)	
- and -	)	
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E.I. DUPONT CANADA COMPANY	)	**Joseph M. Steiner,**
Defendant	)	**Christopher P. Naudie and**
	)	**Laura F. Cooper**, for the Defendant
	)	
	)	
	)	
	)	
	)	**HEARD:** June 11 to 13, 2007

Hoy J.

REASONS FOR DECISION

I INTRODUCTION

[1] This proposed class proceeding alleges that E.I. DuPont Canada Company ("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.

[2] The automotive industry is comprised of the original equipment manufacturer ("OEM") at the top, such as General Motors, Ford and Daimler Chrysler, and several "tiers" of manufacturers below. "Tier 1" manufacturers supply parts and assemblies directly to OEMs. Magna Corporation is one of the industry's largest Tier 1's. "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, and sometimes "Tier 4"

suppliers manufacture parts for supply to Tier 3 manufacturers. Some manufacturers operate on more than one tier. For example, some are both Tier 1 and Tier 2 manufacturers.

[3] The proposed representative plaintiff, Axiom Plastics Inc. ("Axiom"), is currently largely a Tier 1 manufacturer. During the proposed class period, it was principally a Tier 2 manufacturer.

[4] The defendant, DuPont, manufactures, among other things, several types of engineering resins used regularly in automotive parts, as well as in non-automotive applications. DuPont sells the engineering resins in Canada directly, and through its three distributors.

[5] While a major supplier of engineering resins in Canada, DuPont has at least 16 competitors in the engineering resins market in Canada, a number of which, like DuPont, are affiliates or distributors of multinational corporations.

[6] Axiom alleges that DuPont's arrangements with its distributors, which Axiom calls the "CUPS system" and which are briefly described below, and DuPont's agreements with certain Tier 1 manufacturers, including but not limited to divisions of Magna International Inc., also briefly described below, violate sections 45(1)(b), (c) and (d) and section 61(1)(a) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended, and that class members have suffered damage as a result thereof and are therefore entitled to recover damages pursuant to section 36 of the *Competition Act*. Axiom alleges vertical, as opposed to horizontal, price-fixing; it does not allege that DuPont conspired with other manufacturers of engineering resins to fix prices. Axiom asserts that the same conduct also founds claims for civil conspiracy and unjust enrichment.

[7] Axiom paints the "CUPS system" as the heart of its case. DuPont supplies engineering resins to its distributors at DuPont's "list price" in effect from time to time, less a percentage discount that ranges from 4 to 8%, depending on the product. The "list price" is DuPont's list price for direct sales of the particular engineering resin to its own customers. DuPont has entered into agreements with some Tier 1 manufacturers, agreeing to supply resins to the Tier 1 manufacturer and the Tier 1's "moulders" at less than DuPont's list price. Moulders are Tier 2 manufacturers who use the resin to produce parts supplied to Tier 1 manufacturers. When DuPont's distributors supply resins to moulders that DuPont has agreed shall be entitled to acquire resins at preferential prices, or to other moulders that ask the distributor for a price less than the list price, the distributor asks DuPont to reduce the price at which DuPont supplies resins to the distributor by the amount of the discount requested by the moulder. The parties refer to this as "price support". If DuPont agrees to the price support, then, after the distributor completes the sale to its customer, DuPont gives the distributor a credit, referred to as a "Credit Upon Proof of Sale", or "CUPS".

[8] For example, if the list price was $10.00, and the distributor's discount was 8%, in the first instance, DuPont would sell the resin to the distributor for $9.20 ($10.00 - 8% of $10.00, which is $0.80 = $9.20). If DuPont agreed to price support of $2.00 on that order, then, upon proof of sale by the distributor, DuPont would pay a credit to the distributor of $1.84 ($9.20 – ($8.00 - 8% of $8.00, which is $0.64 = $7.36) = $1.84). Until the distributor

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receives its CUPS associated with that sale, the distributor's cash flow from the transaction is negative: it has paid $9.20 for the resin and sold it for $8.00. It has a receivable from DuPont of $1.84.

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[9] Axiom argues that the economic effect of the "CUPS system" is that the distributor is compelled to sell resins to moulders at not less than the list price unless DuPont agrees. DuPont denies that there is a "system"; I use the term "CUPS system" in these reasons for ease of reference without determining that the arrangements amount to a "system".

[10] DuPont has entered into various forms of agreement, which I refer to as "Tier 1 Agreements", with several Tier 1 manufacturers that specify the prices that the moulders who supply the Tier 1 manufacturer will be charged for DuPont resins. Counsel for DuPont characterizes these prices as "preferential prices". These agreements also provide that, in consideration of the Tier 1 manufacturer requiring Tier 2 manufacturers to use DuPont engineering resins in the manufacture of parts supplied to it, 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. In simple terms, for each $100 paid to DuPont or one of its authorized distributors by a moulder who supplies a particular Tier 1 manufacturer, DuPont pays that Tier 1 manufacturer, say, $20.00.

[11] Axiom seeks to certify this action as a class proceeding pursuant to section 5(1) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6, as amended, (the "CPA") on behalf of a broad but relatively small class, comprised of all purchasers in Canada since January 2000 of engineering resins for an automotive application from DuPont or its authorized distributors, excluding DuPont, its distributors and specified Tier 1 manufacturers and their respective associated and affiliated companies.

II SUMMARY CONCLUSION

[12] This action shall be certified as a class proceeding, subject to :

(1) the definition of the class being amended to consist of:

> All purchasers in Canada <u>between</u> January 2000 <u>and [date of certification]</u> of engineering resins for an automotive application from E. I. DuPont Canada Company ("DuPont"), its predecessor DuPont Canada Inc., or its authorized Canadian distributors, <u>who were required by a customer to use only engineering resins manufactured by DuPont in the automotive application,</u> excluding the following companies and their associates and affiliates: Ashland Canada Inc., Canada Colors and Chemicals Ltd., E. I. DuPont Canada Company, Magna International Inc., Multimac Inc., Omron Dual Tech Automotive Electronics Inc., PolyOne Canada Inc., DuPont or its authorized Canadian distributors; and

(2) the proposed common issues (which are reproduced under the heading "The Proposed Common Issues" in Part VI (2) below) being amended to delete reference to the Tier 1 Agreements (called "rebate agreements" in Axiom's draft of the common issues), so that this action proceeds as a class proceeding only in relation to the "CUPS system".

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With these changes, a class proceeding is the preferable procedure for advancing and resolving the claims of the class members. Without these changes, it is not.

III THE TEST FOR CERTIFICATION

[13] Section 5(1) of the CPA sets out the test for certification:

> The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[14] The plaintiffs must show some basis in fact for each of the certification requirements in section 5(1), other than the requirement in section 5(1)(a) that the pleading discloses a cause of action. See *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158 at para. 25.

IV THE 5(1)(a) REQUIREMENT: CAUSE OF ACTION

(1) *The Test*

[15] In determining whether the pleading discloses a cause of action, no evidence is admissible. The pleading will be struck out only if it is plain, obvious and beyond a reasonable doubt that the plaintiff cannot succeed. See *Hollick* at para. 25 and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 41 (C.A.). The material facts pleaded must be accepted as true, unless patently ridiculous or incapable of proof.

[16] As indicated above, Axiom pleads that what it calls the "CUPS system" and the Tier 1 Agreements violate sections 45(1)(b), (c) and (d) and section 61(1)(a) of the *Competition Act*, and that class members have suffered damage as a result thereof and are therefore entitled to recover damages pursuant to section 36 of the *Competition Act*. (Section 36 provides that a person who has suffered damage as a result of conduct contrary to Part VI of the *Competition Act* may sue for the damage. Sections 45 and 61 are in Part VI of the *Competition Act*.) Axiom further pleads that the same conduct also founds claims for civil conspiracy and unjust enrichment.

(2) *DuPont's Position*

[17] DuPont argues that it is plain and obvious that Axiom's claim for damages under section 36 of the *Competition Act*, to the extent founded on alleged breaches of section 45(1), cannot succeed. DuPont submits that what Axiom alleges is fundamentally "exclusive dealing", which is a reviewable practice governed by section 77(1) of Part VIII of the *Competition Act*, reviewable practices are within the exclusive jurisdiction of the Competition Tribunal, and there is no right of action for damages under section 36 of the *Competition Act* for reviewable practices in the absence of non-compliance with a Tribunal order. DuPont relies on *Pro-Sys Consultants Ltd. v. Microsoft Corp.,* [2006] B.C.J. No. 1564 at paras. 32, 41, 45-46, 49 (B.C.S.C.), *Ice Fashionable Accessories Inc. v. Holt Renfrew & Co*., [2001] O.J. No. 1527 at para. 18 (S.C.J.), varied on other grounds (2002), 155 O.A.C. 355 and *Charette v. Honeywell Ltd*. (2003), 40 B.L.R. (3d) 181 at paras. 9-11 (F.C.) for its position that it is plain and obvious that a claim under section 36 of the *Competition Act*, based on a breach of section 45(1), cannot succeed.

[18] DuPont argues that, by extension, Axiom has no cause of action under the second branch of the tort of civil conspiracy, known as the "unlawful means" branch, or for unjust enrichment, to the extent Axiom relies on breaches of section 45(1) as the unlawful means and lack of juristic reason required to make out those causes of action.

[19] DuPont does not otherwise assert that Axiom has failed to meet the requirements of section 5(1) (a) of the CPA.

[20] I must nonetheless briefly consider whether the alleged causes of action are made out.

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(3) *The Applicable Sections of the Competition Act*

[21] The applicable sections of the *Competition Act* are the following:

> 36. (1) Any person who has suffered loss or damage as a result of
>
> > (a) conduct that is contrary to any provision of Part VI, or
> >
> > (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> . . .
>
> (4) No action may be brought under subsection (1),
>
> > (a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from
> >
> > > (i) a day on which the conduct was engaged in, or
> > >
> > > (ii) the day on which any criminal proceedings relating thereto were finally disposed of,
>
> whichever is the later; and
>
> > (b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from
> >
> > > (i) a day on which the order of the Tribunal or court was contravened, or
> > >
> > > (ii) the day on which any criminal proceedings relating thereto were finally disposed of,
>
> whichever is the later.

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. . .

45. (1) Every one who conspires, combines, agrees or arranges with another person

> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
>
> (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
>
> (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
>
> (d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

(2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

(2.1) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.

(2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that

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the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

. . .

61. (1) No person who is engaged in the business of producing or supplying a product, who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography, shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

. . .

77. (1) For the purposes of this section,

"exclusive dealing" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable

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> terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

(4) ***Conclusion and Analysis***

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[22] It is not plain and obvious to me that a claim for damages under section 36 of the C*ompetition Act*, founded on a breach of section 45(1) or 61 of the *Competition Act*, or that the claims in civil conspiracy and unjust enrichment cannot succeed. The requirement of section 5(1)(a) of the CPA has been satisfied.

(i) Claim under section 36 of the Competition Act, based on a breach of section 45 of the Competition Act

[23] Axiom has specifically pleaded, in paragraph 12(a) of its Statement of Claim that, DuPont has "conspired, combined or agreed or arranged with others to: (i) enhance unreasonably the price of engineering resins charged to members of the proposed class, contrary to section 45(1)(b)…; (ii) prevent or lessen, unduly, competition in the sale or supply of engineering resins to the members of the proposed class contrary to section 45(1)(c)…; (iii) otherwise restrain or injure competition unduly contrary to section 45(1)(d)…" .

[24] In paragraph 13(a) of its Statement of Claim, Axiom pleads that the Tier 1 Agreements require Tier 2 plastics moulders to use DuPont resins, "fix and maintain the prices…which Tier 2 manufacturers pay for DuPont engineering resins, which prices are significantly above the prices that they would pay absent such conspiracy", and provide for DuPont to secretly remit to the Tier 1 manufacturers substantial monies as a result of the price enhancement to the Tier 2 manufacturers.

[25] In paragraph 28 of its Statement of Claim, Axiom particularizes the damage that it alleges class members have sustained as a result of the alleged breaches of the *Competition Act* and the conspiracy. They include paying prices that were unreasonably enhanced and maintained, being denied the ability to negotiate lower prices with the Authorized Canadian Distributors and having been prevented from sourcing identical lower-priced resins from third party suppliers.

[26] As noted above, the material facts pleaded must be accepted as true, unless patently ridiculous or incapable of proof.

[27] As pleaded, Axiom's claim is not fundamentally, or solely, one of exclusive dealing. Axiom claims that the Tier 1 Agreements secretly fixed the prices that persons who are not parties to the Tier 1 Agreements must pay for DuPont resins. It is not plain and obvious to me that such arrangements fall clearly, and solely, within "exclusive dealing", as defined in section 77(1) of the *Competition Act*.

[28] The cases on which DuPont relies – *Pro Sys*, *Ice Fashionable* and *Charette* - are very different.

[29] In *Pro-Sys*, damages were not claimed under section 36 of the *Competition Act.* The plaintiff alleged two torts: interference with economic relations and conspiracy. What was at issue was whether conduct of the nature described in Part VIII of the *Competition Act* satisfied the requirement, in relation to the first alleged tort, and the "unlawful means" branch of the tort of conspiracy, for conduct that was "illegal" or involved unlawful means". The court concluded that in the absence of an order of the Competition Tribunal, it did not. Allegations of conduct in violation of s. 45 were found to fulfill this requirement.

[30] *Ice Fashionable* similarly held that conduct amounting only to a reviewable practice under the *Competition Act* did not fulfill the unlawful means element of the tort of interference with economic relations.

[31] At issue in *Charette* was the defendant, Honeywell's, refusal to provide its parts to persons, and authorize persons to service its equipment, unless accredited by Honeywell as an authorized service person. To become accredited, potential service providers had to participate in an application and accreditation process. The motions judge found that this did not amount to conduct in violation of section 45 of the *Competition Act,* and dismissed the plaintiff's action. *Charette* was a summary judgment motion and is fact specific.

(ii) Claim under section 36 of the Competition Act, based on a breach of section 61 of the Competition Act

[32] With respect to section 61 of the *Competition Act*, at paragraph 24 of its Statement of Claim, Axiom pleads that, "At various times during the Class Period, DuPont has entered into agreements, both in writing and orally, with its Authorized Canadian Distributors and/or engaged in threats, promises or other like conduct *vis-à-vis* its Authorized Canadian Distributors, including but not limited to the acts set out in paragraphs 15, 18 and 19 hereof, to require the Authorized Canadian Distributors to supply and offer to supply DuPont engineering resins to the Tier 2 manufacturers at the Conspiracy Prices, and to discourage the Authorized Canadian Distributors from reducing the prices thereof."

[33] Paragraph 13(b) defines "Conspiracy Prices" as the fixed and maintained prices which the Tier 2 manufacturers pay for DuPont engineering resins.

[34] Paragraphs 15, 18 and 19 set out particulars, including that DuPont provided lists to its Authorized Canadian Distributors setting out the Conspiracy Prices, met and corresponded with them to enforce compliance and discourage or prevent the reduction thereof, and required Authorized Canadian Distributors to monitor Tier 2 manufacturers purchase volumes and report any Tier 2 purchaser suspected of buying from a source other than DuPont or its Authorized Canadian Distributors.

[35] As indicated above, Axiom pleads that class members suffered damage as a result of this conduct.

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[36] It is not plain and obvious that DuPont's claim, based on a breach of section 61, could not succeed.

(iii) Civil Conspiracy

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[37] The plaintiff asserts a civil conspiracy claim against DuPont under the second branch of the tort of civil conspiracy test, known as the "unlawful means" branch. The tort is made out where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result. *Canada Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452 at paras. 32-35.

[38] In order to make out a claim under the unlawful means branch, it is necessary to plead: who the several parties are in a relationship with each other; the agreement between the defendants to conspire, and state precisely what was the purpose or what were the objects of the alleged conspiracy; the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and the injury and damage occasioned to the plaintiff thereby. *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 at paras. 21-22 (C.A.).

[39] All of these elements have been pleaded.

[40] The "unlawful means" element is satisfied by an allegation that the resulting conduct of the conspirators breached sections 45 and 61 of the *Competition Act*. In paragraph 13, Axiom pleads that the Tier 1 Agreements were entered into to enhance unreasonably the prices of resins sold to class members. In paragraph 30 of the Statement of Claim, Axiom pleads that that DuPont was aware that its actions would have a major adverse impact on class members. Axiom identifies alleged conspirators: DuPont's authorized Canadian distributors and six named Tier 1 manufacturers. It provides particulars of the acts it alleges DuPont has done, and the damage alleged to have been suffered as a result.

(iv) Unjust Enrichment

[41] The Statement of Claim alleges at paragraph 27 that DuPont has been unjustly enriched by its conduct. The three elements necessary for the pleading of unjust enrichment, namely the enrichment of the defendants, the corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment (see *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at para. 38) have all been adequately pleaded.

V THE 5(1)(b) REQUIRMEMENT: AN IDENTIFIABLE CLASS

[42] Class definition is important because it identifies persons who are entitled to notice and relief, if awarded, and who will be bound by any judgment or settlement if they do not opt out.

[43] The class must be defined by reference to objective criteria, without reference to the merits of the action. There must be some rational relationship between the class and

the common issues. The plaintiff has an obligation, although not an onerous one, to show that the class is not unnecessarily broad, in the sense that it could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues. (*Hollick* at paras. 17, 20-21, and *Cloud* at para. 45.)

[44] Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended. (*Hollick* at para. 21.)

[45] The class definition necessarily impacts on the analysis under s. 5(1)(c) of the CPA as to whether the claims of the class members raise common issues. Issues may not be common if the class is too broadly drawn. Class definition also impacts on the preferability analysis under s. 5(1)(d) of the CPA. If the class is too broad, the class action may not be manageable.

[46] Axiom initially proposed a class that included all purchasers of DuPont engineering resins since January 2000, "for use in parts manufactured…for supply to a Tier 1 automotive manufacturer."

[47] A few months before this motion was heard, Axiom amended and expanded its proposed class and currently seeks to represent the following class:

> All purchasers in Canada since January 2000 of engineering resins for an automotive application from E. I. DuPont Canada Company, its predecessor DuPont Canada Inc., or its authorized Canadian distributors, excluding the following companies and their associates and affiliates: Ashland Canada Inc., Canada Colors and Chemicals Ltd., E. I. DuPont Canada Company, Magna International Inc., Multimac Inc., Omron Dual Tech Automotive Electronics Inc., PolyOne Canada Inc.

[48] Counsel for Axiom indicated that they would be content to have the class period end upon certification, and I have treated the class definition as amended to provide that it ends on such date.

[49] Based on a list of moulders compiled from documents produced by DuPont, counsel for Axiom says the proposed class consists of not more than 216 moulders, and probably between 100 and 200 moulders, once duplication is eliminated.

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

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[51] The single class proposed also includes both 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.

[52] Axiom's counsel argues that DuPont maintained a high price for resins available from its authorized distributors through its "CUPS system", that by doing so DuPont was able to itself charge higher prices on its direct sales of resin to persons at all tiers of the automotive sector, and that it is therefore appropriate to include in the class persons who purchased resins directly from DuPont at any time when the CUPS system was in effect, regardless of the tier to which they belonged. Therefore, Axiom argues, a class that does not include all purchasers, at all tiers, will necessarily eliminate purchasers who have claims under ss. 45 and 61 of the *Competition Act* and at common law.

[53] Axiom did not argue that the Tier 1 Agreements had the effect of increasing the prices paid by purchasers other than purchasers whose purchase prices were stipulated in the Tier 1 Agreements.

[54] As discussed below in Part VI (5), which addresses proposed common issues 5, 6, 7, 8, and 9, in relation to whether loss is a common issue, Axiom has not provided any evidence that all members of the proposed, broadly defined class would have sustained loss as a result of the alleged conduct.

[55] In support of its theory, and the manner in which it has defined its class, Axiom relies on *Wong v. Sony Canada Ltd.* (2001), 9 C.P.C. (5th) 122 (Ont. S.C.J.). In that case, the plaintiff similarly alleged breach of the resale price maintenance provisions of the *Competition Act*, and included in the proposed class both persons who purchased Sony products at independent retailers and persons who purchased Sony products at Sony's own stores. Significantly, *Wong* was before the court as a pleadings motion.

[56] Cummings J. noted, at paras. 24 and 25 that, "[T]he plaintiff's theory in the amended statement of claim is that the defendant, by engaging in unlawful, anti-competitive retail price maintenance with independent retailers and franchisees purchasing Sony products, was thereby able to maintain similarly higher retail prices at The Sony Store retail stores. In my view, if the allegations are proven, then it is arguable that customers purchasing from The Sony Store retail stores are persons who have suffered loss or damage within the ambit of s. 36(1) of the *Competition Act*. Hence, at least as a matter of pleading, I do not accept the defendant's contention that the pleading does not disclose a reasonable cause of action by putative class members who are customers of The Sony Store retail stores."

[57] *Wong,* as noted above, was a pleadings case. As such, no evidence was considered on the motion. In contrast, Axiom must show some basis in fact that the requirement of s. 5(1)(b) has been met.

[58] Axiom pleads two distinct types of conspiracies, the CUPS system conspiracy and the Tier 1 Agreements conspiracies, with two types of alleged co-conspirators, the authorized distributors in the case of the alleged CUPS system conspiracy, and various Tier 1 manufacturers in the case of the alleged Tier 1 Agreements conspiracies. As discussed in Part

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VI below, under my consideration of the 5(1)(c) common issues requirement, the issues of fact arising from the two different types of conspiracy claims advanced are different.

[59] The proposed class is defined by reference to objective criteria, without reference to the merits of the action.

[60] The analysis of whether or not there is "some rational relationship" between the class and the common issues overlaps with the analysis of whether or not the proposed common issues constitute common issues. The scope of the class affects whether an issue is a common issue.

[61] Here, in the case of the alleged CUPS system conspiracy, at first blush, there appears to be some rational relationship between the proposed class and the proposed common issues. However, I conclude below in my consideration of the common issues and preferable procedure requirements that, as a result of the broad definition of the proposed class, virtually none of the proposed common issues constitute common issues, and a class proceeding would not be the preferable procedure. As set out in Part VII below, I conclude that if the class were narrowed by restricting it to purchasers required by a customer to use only engineering resins manufactured by DuPont in the automotive application, a class proceeding would be the preferable procedure.

[62] The broad class proposed includes some members- those who purchased resins for automotive applications from DuPont or one of its authorized dealers for supply to a Tier 1 manufacturer who is a party to a Tier 1 Agreement during the term of the applicable Tier 1 Agreement - who have claims that raise common, or purportedly common, issues not shared by all the proposed class members. Accordingly, for the purposes of these reasons, I assume the creation of a subclass (the "Tier 1 Agreements subclass") comprised of those members in relation to the proposed common issues, as they pertain to the Tier 1 Agreements conspiracy. Counsel for Axiom was unable to provide me with an estimate of the size of this subclass. Presumably, it is significantly smaller than the class.

[63] DuPont challenges the proposed class definition on a number of other bases, none of which affect my conclusion above. I address those arguments briefly below before considering the s. 5(1)(c) requirement.

[64] It argues that the proposed class is not readily identifiable, because it will not be clear what constitutes an "automotive application". I believe that this can be determined without a great deal of difficulty.

[65] DuPont also argues that the proposed class is overly broad because it includes persons who are alleged to be conspirators. In para. 17 of its Statement of Claim, Axiom specifically includes as "Tier 1 conspirators", "Edscha North America (a subsidiary of Edscha A.G.) and other Tier 1 manufacturers known only to DuPont and the other conspirators themselves". The class definition does not exclude Edscha, and DuPont therefore argues that Edscha, an alleged conspirator, is included. I conclude in Part VII below, that the conspiracy claims in relation to the Tier 1 Agreements should not proceed by way of class proceeding. Accordingly, this is not an issue.

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[66] DuPont also argues that the proposed class is inherently flawed by conflicts, as a result of including both Tier 1 and Tier 2 manufacturers. It submits that the Tier 1 manufacturers may argue that Tier 2 manufacturers passed on the higher prices to them, and that the Tier 1 manufacturers, and not the Tier 2 manufacturers, sustained damage. DuPont also advanced this argument in relation to the requirement in s. 5(1)(e) of the CPA. For the reasons set out in Part VI (5)(ii) below, under my consideration of that requirement, I am not convinced that the proposed class is inherently flawed for this reason.

[67] DuPont further argues that persons who purchased resins directly from DuPont cannot have a claim under ss. 45 or 61 of the *Competition Act*, and should therefore be excluded from the class. Section 61 speaks to a person attempting to influence upward or discourage the reduction of the price at which another person supplies a product. Section 45, among other things, speaks to a conspiracy to enhance unreasonably the price of the product. Section 36 provides a right to damages to any person who suffered loss or damage as a result thereof. Some persons who purchased resins from DuPont may potentially sustain damage as a result of a breach of section 45 or 61.

[68] DuPont also submits that Axiom has not pleaded a conspiracy to harm other than Tier 2 manufacturers. In fact, Axiom has pleaded that the purpose of these agreements was to injure, and did injure, all class members.

VI THE 5(1)(c) REQUIREMENT: COMMON ISSUES

(1) *The Test*

[69] Section 1 of the CPA defines common issues:

> "common issues" means,
>
> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily *identical facts*[.]
>
> [emphasis added]

[70] *Hollick* at para. 18, explains the test to be applied:

> As I wrote in *Western Canadian Shopping Centres*, the underlying question is 'whether allowing the suit to proceed as a representative one will avoid duplication of fact finding or legal analysis'. Thus an issue will be common 'only where its resolution is necessary to the resolution of each class member's claim' (para. 39). Further, an issue will not be 'common' in the requisite sense unless the issue is a 'substantial…ingredient' of each of the class member's [*sic*] claims.

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[71] As *Cloud* notes, at para. 52, this is a low bar. At para. 53, *Cloud* explains *Hollick*:

> In other words, an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial.

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[72] As *Cloud* explains, at para. 65, the comparative extent of individual issues is a factor in assessing whether a class proceeding is the preferable procedure, not in considering whether the common issues requirement has been met.

(2) *The Proposed Common Issues*

[73] The proposed common issues are as follows:

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

(2) During the Class Period, did DuPont by way of rebate agreements with Tier 1 manufacturers or its CUPS system, conspire, combine, agree or arrange with others to prevent or lessen, unduly, competition in the sale or supply of engineering resins to members of the class, contrary to s. 45(1)(c) of the *Competition Act*?

(3) During the Class Period, did DuPont by way of rebate agreements with Tier 1 manufacturers or its CUPS system, conspire, combine, agree or arrange with others to otherwise restrain or injure competition unduly contrary to s. 45(1)(d) of the *Competition Act*?

(4) During the Class Period, did DuPont by way of rebate agreements with Tier 1 manufacturers or 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 members of the class, contrary to s. 61(1) of the *Competition Act*?

(5) During the Class Period, did DuPont by way of rebate agreements with Tier 1 manufacturers or its CUPS system, enter into a tortious conspiracy with its Canadian distributors and/or Tier 1 conspirators?

(6) If so, is DuPont liable for damages and how are such damages to be computed?

(7) During the Class Period, was DuPont enriched and did the class member suffer a corresponding deprivation by way of rebate agreements with Tier 1 manufacturers or its CUPS system, and was there any juristic reason or justification for DuPont's enrichment?

(8) If so, what restitutionary payment should be made by the defendant to the plaintiffs, and how is such restitutionary payment to be computed?

(9) 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?

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

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(3) *Analysis: Proposed Common Issues 1-4*

(i) The Tier 1 Agreements Conspiracy

[74] The proposed common issues refer to "rebate agreements". Counsel for Axiom clarified that what are at issue are what I have defined as "Tier 1 Agreements", namely agreements with Tier 1 manufacturers that establish one set of resin prices for the Tier 1 manufacturer and a higher set of prices for its moulders, and provide for a rebate to the Tier 1 manufacturer of a portion of the sales price paid by its moulders. Agreements that provide for a rebate but do not stipulate a price to moulders are not at issue.

[75] Axiom points to a total of nine bilateral agreements between DuPont and three different Tier 1 manufacturers as the basis for its Tier 1 Agreements conspiracy allegation.

[76] DuPont entered into agreements with Omron Dualtec Automotive Electronic Inc. dated April 19, 2000 and July 23, 2002, covering, together, the period May 1, 2000 to June 30, 2004, requiring Omron to solely specify DuPont resins; specifying the prices that DuPont would charge Omron and its moulders during the period May 1, 2000 to June 30, 2004; providing for rebates to Omron of a portion of the purchase price paid by Omron's moulders in respect of certain of the resins covered by the agreements, and requiring the agreements to be kept confidential. The first agreement covers what appears to me to be a total of at least 14 different formulations of 4 different types of resins: Rynite, Crastin, Delrin and Zytel. The second adds a fifth type of resin, Zenite, and covers about 20 formulations. Only the second agreement requires Omron to require its moulders to purchase DuPont resins directly from DuPont or one of its authorized dealers. (This provision is of some significance. The evidence on this motion is that moulders could generally acquire DuPont resins from other sources, including in other countries – the so-called "grey market" - at significantly lower prices than those available from DuPont and its authorized distributors during the

proposed class period.) In the case of some resins, the Omron and moulder prices are the same; in others, the Omron prices are less than the moulder prices.

[77] DuPont entered into agreements with Multimatic Inc. dated July 1, 2000 and March 11, 2004, covering the periods July 1, 2000 to December 31, 2001 and January 1, 2004 to December 31, 2005, respectively. The July 1, 2000 agreement does not specify the prices that Multimatic moulders are to be charged, but does require Multimatic to specify DuPont resins, provide for a rebate to Multimatic of a portion of the purchase price paid by Multimatic moulders for certain of the resins, and provide that the agreement shall be kept confidential. It is not apparent to me why Axiom considers this agreement a "Tier 1 Agreement". The March 11, 2004 agreement sets out the prices to be extended to Multimatic moulders, but does not establish pricing for direct purchases by Multimatic. These agreements deal with the supply of a number of different formulations of two resins, Delrin and Minlon. While Multimatic was entitled to rebates under these agreements in respect of certain resins purchased from DuPont or its authorized dealers, the agreements do not require Multimac to require its moulders to purchase DuPont resins directly from DuPont or one of its authorized dealers.

[78] DuPont entered into agreements with Atoma International Corporation, an affiliate of Magna Corporation: dated September 25, 2000 and September 6, 2001, and covering the period July 1, 2000 to December 31, 2003, in relation to its Dortec Industries division; dated September 25, 2000, and covering the period July 1, 2000 to December 31, 2001, in relation to its KTM Locks division; and dated September 27, 2000 and covering the period July 1, 2000 to December 31, 2001 in respect of its WindoMotion division. DuPont also entered into an agreement with Intier Automotive, which I understand to be the successor to the business of Atoma, and also a Magna affiliate, dated October 23, 2001 and covering the period January 1, 2001 to December 31, 2004 in respect of WindoMotion. All of these agreements required the Magna entity to specify DuPont resins if DuPont is competitive on the basis of quality and delivery, set out the prices to be charged to its moulders, and provide for rebates to the Magna entity in respect of moulder purchases of certain, but not all, of the formulations of resins covered by the agreement. Where the agreement provides for a rebate to the Magna entity in respect of moulder purchases of a particular kind of resin, the Magna entity is entitled to buy that formulation directly from DuPont or its authorized distributor, at a price net of the rebate. If the agreement does not provide for a rebate on a formulation, then the Magna and moulder prices are the same. Unlike the agreements with the other alleged Tier 1 conspirators, they specifically require the Magna entity to disclose the rebate structure to its moulders. In each case, the Magna entity was required to communicate this information within one week of signing the agreement. The Dortec agreements cover over 20 formulations of four different kinds of resins: Alcryn, Delrin, Hytrel and Zytel. The KTM agreement covers over 20 formulations of two different kinds of resin, Hytrel and Zytel. The WindoMotion agreement covers what appears to be about a dozen different formulations of three types of resin: Delrin, Minlon and Zytel. All of the above agreements appear to require the Magna entity to ensure that its moulders purchase their DuPont resins directly from DuPont or one of its authorized distributors.

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[79] From the various agreements, it appears that the three alleged co-conspirators are based in Concord, Oakville and Newmarket, Ontario, respectively- generally the same geographic area.

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[80] The Tier 1 Agreements with the three alleged co-conspirators are not standard form agreements. They are clearly individually negotiated agreements. As noted above, one of the purported Tier 1 Agreements (the Multimac July 1, 2000 agreement) does not establish prices at which resins will be offered to moulders and is therefore not a Tier 1 Agreement. The agreements contain a variety of other, individual terms. For example, in some, the manufacturer must purchase a stipulated volume of resins before it is eligible for the rebate.

[81] Axiom has acknowledged the significance of the differences in wording in the various agreements for the supply of resins that DuPont entered into with Tier 1 manufacturers during the class period. For example, in argument, Axiom specifically does not rely on an agreement dated April 15, 2002 with Intier Automotive, in respect of KTM Locks. In that agreement, Intier agrees to "sole specify" a particular formulation of a particular kind of resin, in exchange for a "rebate pre-payment". The agreement does not address the price at which Intier's moulders will be supplied with that particular formulation. This agreement amounts to a "rebate agreement", and is therefore part of common issues 1 to 4, as framed. Nor does Axiom rely on the January 27, 2004 agreement with Intier**,** or the June 1, 2000 agreement between DuPont and another Tier 1 manufacturer, Siemens Canada Limited, as amended, covering the period June 1, 2000 to September 30, 2005, which does not address the prices at which resins are to be supplied to Siemens' moulders.

[82] DuPont argues that proposed common issues 1 to 4 are not "common issues" because Axiom alleges that DuPont has entered into a number of different, bilateral conspiracies, and those various alleged conspiracies, in addition to involving different parties, cover different periods of time, and different types of resins used in automotive applications. DuPont submits the court will have to consider whether each particular alleged conspiracy was capable of having the requisite anti-competitive effect in the relevant product and geographic market. It submits that for some of its resins, competitive alternatives may have been manufactured by its competitors, and for some not, and the relevant market for each will therefore differ.

[83] Moreover, DuPont argues, relying on *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606, pp. 651-660 and *R. v. Clarke Transport Canada Inc.* (1995), 64 C.P.R. (3d) 289, 305 (Ont. Gen.Div.), that since section 45 is a criminal offence, the plaintiff must prove that the defendant intended to enter into the agreement (the "subjective *mens rea*"), and, on an objective view of the evidence, that the defendant was aware or ought to have been aware that the effect of the agreement entered into would be to lessen competition unduly (the "objective *mens rea*"). It argues that this objective *mens rea* requirement will have to be proven on an agreement by agreement basis.

[84] Finally, DuPont argues that under s. 36(4) of the *Competition Act*, a plaintiff must bring a private action for damages arising from alleged criminal conduct under Part VI within 2 years from "a day on which the conduct was engaged in". DuPont says that because class members purchased resins at different times, and the alleged conspiratorial acts

occurred at different times, there will be numerous individual issues of limitations that will have to be addressed.

[85] Axiom was clear that only those agreements with Tier 1 manufacturers that both stipulate the price at which resins are to be supplied to moulders and provide for a rebate are at issue. The July 1, 2000 agreement with Multimac, which does not stipulate the price the Multimac moulders are to be charged, should not be included in this analysis.

[86] Therefore, the issue is whether, if proposed common issues 1 to 4 were recast to refer only to the eight Tier 1 Agreements identified above that stipulate the price at which moulders are to be supplied resins, or those eight agreements together with any further agreements with other Tier 1 conspirators, not yet identified, that fall within the definition of a Tier 1 Agreement, would they constitute common issues for the Tier 1 Agreements subclass?

[87] In the case of s. 45(1)(b) (proposed common issue 1), can it be determined on a common basis for the Tier 1 Agreements subclass that an agreement that requires a Tier 1 manufacturer to specify DuPont resins, stipulates the price at which the Tier 2 moulder is to be supplied resins and provides a rebate to the Tier 1 moulder based on the Tier 2 moulder's purchases of certain DuPont resins constitutes an agreement to enhance unreasonably the price of those resins in respect of which a rebate was paid, as Axiom alleges is the case, or establishes a "preferential price" for the Tier 2 moulder, as DuPont's counsel submits?

[88] All eight of the Tier 1 Agreements currently at issue require the Tier 1 manufacturer to specify DuPont resins. Accordingly, the "relevant market" in relation to these eight agreements is presumably a very small one: where a Tier 2 manufacturer can buy the specified DuPont resin. The "relevant market" appears to be DuPont and its three authorized Canadian distributors in cases where the Tier 1 Agreement requires a Tier 1 manufacturer to ensure the moulder buys only from DuPont, or its authorized Canadian distributors, or such persons, and the "grey market", where it does not. Therefore, assuming but not determining that this is the relevant market, despite the fact that the agreements involve different parties and cover different periods of time and different formulations of resins, it appears, at first blush, that whether each of the alleged conspiracies in respect of these eight Tier 1 Agreements had the requisite anti-competitive effect may well be capable of being determined on a common basis. Moreover, having regard to the common requirement that each of the Tier 1 manufacturers only specify DuPont resins, coupled with the clause stipulating the price at which the resins are to be provided to the moulders, it is similarly possible that the requisite objective *mens rea* element might be proven on a common basis.

[89] The limitation period argument raised by DuPont is an individual issue and should be considered at the preferable procedure stage of the analysis.

[90] The clause in the agreements with the Magna entities requiring them to disclose the rebate structure to the Tier 2 manufacturers is, however, significant. If the Tier 2 manufacturers were aware of the rebate, it might have been a factor, express or implicit, in

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price negotiations between the Tier 1 manufacturer and its Tier 2 moulders. Whether or not it was a factor could affect whether the price was "unreasonably" enhanced.

[91] Axiom was affected by at least one such agreement. Its evidence is that WindoMotion did not comply with the requirement in its September 27, 2000 agreement with DuPont to disclose the rebate structure to its moulders within one week of signing the agreement; Axiom says it became aware of the rebate arrangement only at a meeting in November 2002, nearly two years after the agreement was signed. At that meeting, Axiom sought an explanation as to why WindoMotion had charged it $134,000 U.S. Axiom says it was told that this represented money WindoMotion had lost – forgone rebates - because Axiom had not purchased the DuPont resins it used in parts it supplied to WindoMotion from DuPont or one of its three distributors. Instead, Axiom had purchased DuPont resins in the "grey market", where they were considerably cheaper.

[92] Axiom points to the fact that DuPont did not maintain any records as to whether or not the Magna entities complied with this requirement to advise moulders of the rebate structure. The agreements do not, however, require the Magna entities to furnish proof of compliance to DuPont.

[93] What is relevant is what DuPont and the Magna entities agreed to, and the likely effect of those agreements, not the actual effect of the agreements. Evidence as to the actual effect of an agreement does, however, offer good guidance as to the likely effect of the agreement. See *R. v. Nova Scotia Pharmaceutical* at para. 107.

[94] The evidence at this juncture is that DuPont required the Magna entities to tell its moulders about the rebates, and, in the case of Axiom, WindoMotion did not comply with that requirement. This latter evidence is specific to Axiom's experience. In the case of other moulders who supplied Magna entities pursuant to the Tier 1 Agreements, it will have to be determined which, if any, of them were advised of the rebate structure. If none were advised, then Axiom might seek to argue either that it was understood by the parties to those agreements that the moulders would not be told, or that it was a likely effect of the agreements. If Axiom were not successful in such arguments, these clauses would have to be considered in determining whether these agreements constituted agreements to "unreasonably" enhance the price of the resins. These are issues unique to moulders who supplied the Magna entities and must be determined in order to resolve the proposed common issue; they are not individual issues remaining to be decided <u>after</u> its resolution. These clauses result in proposed common issue 1 not being "common" in the case of the Tier 1 Agreements with the Magna entities.

[95] Setting aside the five agreements between DuPont and the Magna entities because of this significant distinction, one is left with three Tier 1 Agreements.

[96] Only one of those three agreements requires the Tier 1 manufacturer to ensure that its moulders purchase DuPont resins only from DuPont or one of its three authorized Canadian distributors. Whether the Tier 2 moulders were at liberty to purchase resins from the "grey market", where, based on the evidence before me, the prices were generally

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significantly lower, will be a factor in determining whether an agreement enhances prices unreasonably.

[97] I therefore conclude, based on the differences in the eight Tier 1 Agreements at issue, that proposed common issue 1, as it relates to the Tier 1 Agreements and the Tier 1 Agreements subclass, is not a common issue. Moreover, other, significant differences may appear in Tier 1 Agreements with Tier 1 conspirators not yet identified.

[98] For the same reasons, I conclude that proposed common issues 2 (lessen unduly competition in the sale of a product) and 3 (restrain or injure competition unduly), as they relate to the Tier 1 Agreements and the Tier 1 Agreements subclass, are not common issues. The word "unduly" expresses a notion of seriousness or significance: *R. v. Clarke*, p. 307, quoting *Nova Scotia Pharmaceutical*, p. 62 D.L.R. and p. 29 C.P.R. Whether or not there is a restriction on "grey market" purchases is particularly significant in determining whether or not competition in supply has been "unduly" lessened in the small market for the supply of DuPont resins.

[99] Proposed common issue 4, relating to s. 61(1) of the *Competition Act*, is whether, by way of the Tier 1 Agreements, DuPont attempted to influence upward, or to discourage the reduction of, the price at which any other person supplied, or offered to supply, DuPont resins. The "other person" is in this case presumably one of DuPont's three authorized Canadian distributors. I found the reference to the Tier 1 Agreements in conjunction with proposed common issue 4 confusing, having regard to Axiom's theory of the case, or at least to what I have understood to be its theory. What I understand to be at issue, and what Axiom has pleaded, is that DuPont agreed with its distributors, and/or engaged in threats, promises or other like conduct *vis-à-vis* its Canadian distributors, to require them to supply DuPont resins at stipulated prices. The distributors are not parties to the Tier 1 Agreements. The Tier 1 Agreements are, possibly, evidence of stipulated prices. I can only assume that Axiom says that the existence of agreements between DuPont and its distributors is to be inferred from the Tier 1 Agreements - *i.e.*, DuPont would not commit that particular resins would be supplied to moulders at a particular price during a particular time period unless it had the agreement of the distributors to do so. In my view, this is not a common issue. At this juncture, eight different Tier 1 Agreements have been identified, covering different products and time periods. There are three distributors. The proposed common issue does not speak to a system in relation to the Tier 1 Agreements, as it does in the case of the alleged "CUPS system". This means that, at a minimum, 24 separate agreements would have to be inferred.

[100] If I am wrong in concluding that, because of the number of agreements involved and the differences among them, proposed common issues 1 through 4 are not common issues as they relate to the Tier 1 Agreements, it does not affect the outcome of this motion. The variations in the agreements would, if not a proper basis for concluding that the proposed common issues are not common, be considered at the preferable procedure stage of the analysis and, as individual issues, weigh against certification.

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(ii) The CUPS System Conspiracy

[101] DuPont has three authorized Canadian distributors: Ashland Canada Inc., Canada Colors and Chemical Ltd. and PolyOne Canada Inc.

[102] DuPont points out that it only has written agreements with Ashland and Canada Colors; that while similar, they are not in the same form; and that the agreement with Ashland specifically provides that it is not obliged to accept DuPont's suggested resale prices. DuPont also points out that while these agreements require Ashland and Canada Colors to report periodically to DuPont regarding the identity of persons to whom they sell resins, and the quantity purchased, they do not require them to report the prices at which they sell resins.

[103] These agreements are not at issue, and the fact that DuPont does not have written agreements with all three of its distributors, and that the forms of the two written agreements it does have vary, does not affect whether these are common issues in relation to the CUPS system. The written agreements do not establish what Axiom calls the "CUPS system". It is not disputed that what Axiom calls the "CUPS system" (and what DuPont says does not amount to a "system") applies to all three in respect of their sales of resins for automotive applications during the proposed class period.

[104] While Axiom alleges three separate CUPS system conspiracies, one with Ashland, one with Canada Colors and one with PolyOne, it has shown some basis in fact that the three raise common issues of fact. In each case, the first matter at hand will be to determine whether the likely effect of the "CUPS system" is that the distributor is compelled to sell at not less than the list price, unless DuPont otherwise agrees. The resolution of this issue is necessary to the resolution of each of the CUPS system conspiracy class member's claims. It will avoid duplication of fact finding.

[105] If it were determined that the effect of the "CUPS system" is that the distributor is compelled to sell at not less than the list price, it may well be that the requisite objective *mens rea* would be inferred.

[106] As discussed above, proposed common issues 1, 2 and 3 also involve considerations of whether the price has been "unreasonably" enhanced, or competition in the relevant market "unduly" prevented, lessened, restrained or injured.

[107] The *Nova Scotia Pharmaceutical* case, which considered the equivalent of s. 45(1)(c), explains, at paras. 95-97, that the determination of whether an agreement "unduly" restricts competition involves a preliminary determination of the relevant market, considering both geographical and product aspects, and then an analysis of the structure of the market and the behaviour of the parties to the agreement, as well as the relationship between them. It explains, at para. 99, that the aim of the market structure inquiry is to ascertain the degree of market power of the parties to the agreement.

[108] Proposed common issues 1, 2 and 3 will involve common issues of law, to the extent of determining the correct general process whereby unreasonableness or undueness is

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to be assessed; however, because of the broad definition of the class, a common definition of the relevant market does not appear to emerge, and a common market share analysis would accordingly not appear to apply.

[109] In the case of large Tier 1 manufacturers, such as Edscha and Siemens, who determine which resin to specify, the relevant market may include all manufacturers of engineering resins having the physical properties at issue who supply, or can supply, the Canadian market, and the market structure analysis may focus on DuPont's relative position in that market. Moreover, those large Tier 1 manufacturers have significant bargaining power, and the likely effect on them of the CUPS system may be significantly different than on a small Tier 2 manufacturer.

[110] In the case of Tier 2 manufacturers who are required by their Tier 1 manufacturers to purchase DuPont resins, the relevant market may be much smaller, possibly comprising only the market for DuPont resins, and the market structure inquiry would be similarly different. DuPont's market power would be much greater.

[111] Accordingly, I conclude that the "unreasonableness" and "undueness" part of the inquiry are not common issues for the class, as defined.

[112] The same issues do not arise in the case of proposed common issue 4. That issue considers whether the CUPS system amounted to an "agreement, threat, promise or like means" to discourage the reduction of prices at which DuPont's distributors supply engineering resins to class members. I am satisfied that proposed common issue 4, which does not entail considerations of "unreasonableness" and "undueness", is a common issue for the class. Whether, if common issue 4 were answered in the affirmative, damage (proposed common issue 6) would be a common issue is addressed in (5) below.

(4) *Proposed Common Issues 5 and 7: Tortious Conspiracy (excluding the issue of actual injury) and the element of juristic reason in unjust enrichment.*

[113] The same facts giving rise to the claims under the *Competition Act* found the claims in civil conspiracy and unjust enrichment.

[114] The elements of a tortious conspiracy and unjust enrichment are reviewed above, in Part IV (4)(iii) and (iv), in the analysis of whether the s. 5(1) (a) requirement was met with respect to those alleged claims by Axiom.

[115] As indicated there, Axiom points to the alleged breaches of ss. 45 and 61 of the *Competition Act* as the unlawful conduct on which their conspiracy claim is founded. I concluded above that whether the conduct at issue breaches s. 61 of the *Competition Act* is a common issue in relation to the proposed class, in the case of the CUPS system. Whether the conduct was directed towards the class, and whether DuPont should have known injury to that class was likely to occur, entail common issues of fact and are therefore common issues. Whether the final element of a civil conspiracy is a common issue, namely whether injury to class members actually resulted, is considered under the next heading. Whether proposed common issue 5 is a common issue turns on that analysis.

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[116] I am satisfied that the issue of whether there is a juristic reason for DuPont's enrichment, if it has been enriched, will involve common issues of fact for class members. Therefore, if the elements of enrichment and deprivation are common issues, which I consider under the next heading, proposed common issue 7 will be a common issue.

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(5) *Proposed Common Issues, or elements of proposed common issues, 5, 6, 7, 8 and 9: actual injury to class members, liability for damages, enrichment and deprivation, restitutionary payment and aggregate assessment of monetary relief*

[117] A civil remedy for breach of section 45(1) or 61(1) of the *Competition Act* only arises under s. 36 of the *Competition Act* if the person has suffered damage as a result. Similarly, damage or injury is an essential element of a tortious conspiracy claim, and deprivation is an essential element of the alternative claim of unjust enrichment that Axiom advances, and on which the remedy of restitution sought is based.

[118] As noted at para. 59 of the Court of Appeal's recent decision in *Markson v. MBNA Canada Bank*, [2007] O.J. No. 1684 strictly speaking, it is not necessary to state the possibility of an aggregate award of damages as a common issue for trial. It was found appropriate to do so there because of the importance of the issue, and similarly, if it is found to be a common issue, it is appropriate here.

[119] Damages, and presumably the amount of the unjust enrichment, in a price-fixing case are the difference between the actual prices paid and the prices that would have existed but for the price-fixing conspiracy ("but-for prices").

(i) The Parties' Positions

[120] Axiom submits that where price-fixing is proven, it is obvious that a direct purchaser suffers damage, and deprivation, and that the plaintiff is not required to adduce expert evidence that loss or deprivation is a common issue for certification. Axiom submits that it only need show "some basis in fact', as required by *Hollick*, and that it has done so. In effect, it says that the "some basis in fact" is the fact that the class members are direct purchasers. Moreover, it submits that DuPont's own expert, Professor James Hughes, conceded on cross-examination that if prices paid by Canadian moulders were artificially inflated, and the prices paid by foreign moulders with whom the Canadian moulders compete were not, the Canadian moulders would suffer damage. Finally, Axiom argues that its expert, Margaret Sanderson, a former Assistant Deputy Director of Investigation and Research within the Economics and International Affairs Branch of the Competition Bureau, and now a consultant, has provided evidence that damages can be calculated on a class-wide basis.

[121] Axiom also relies on the Court of Appeal's recent decision in *Markson* to argue that, in any event, only *potential* liability need be established on a class-wide basis for loss to be a common issue.

[122] DuPont concedes that Axiom is not required to show the quantum of loss or damage that each class member suffered, but says that it must show some basis in fact that each member of the proposed class has suffered some loss, and that Ms. Sanderson's opinion

and the other evidence adduced do not. Moreover, DuPont's expert, Professor James Hughes, opines that class members would have passed on, and therefore not sustained, any loss. DuPont relies on two proposed competition class actions in which certification was denied, *Chadha v. Bayer Inc*. (2003), 63 O.R. (3d) 22 (C.A.), affirming (2001) 200 D.L.R. (4th) 309 (Ont. Div. Ct.) and *Price v. Panasonic Canada* (2002), 22 C.P.C. (5th) 379 (Ont. S.C.J.). DuPont submits that *Chadha v. Bayer Inc.* establishes the standard of evidence required to establish loss as a common issue in a price-fixing case and that Axiom falls short of that standard. Finally, Professor Hughes challenges Ms. Sanderson's opinion that damages can be calculated on a class-wide basis.

(ii) Analysis and Conclusion

[123] I have concluded that proposed common issues 1 through 4 are not common issues in relation to the Tier 1 Agreements, even assuming the creation of a Tier 1 Agreements subclass. Therefore, loss in relation to the Tier 1 Agreements cannot be a common issue.

[124] This leaves the issue of whether loss is a common issue in relation to the CUPS system.

[125] Axiom concedes that Ms. Sanderson does not opine that the alleged unlawful conduct would have impacted on members of the class through higher prices. Axiom's counsel says that Ms. Sanderson was not asked to opine on this issue, and, as indicated above, relies on the fact that class members were direct purchasers of the engineering resins.

[126] DuPont's expert, Professor James Hughes, submits that had Tier 2 manufacturers been charged lower prices, the Tier 1 manufacturers, who operate in an intensely competitive environment, would have forced the Tier 2 manufacturers to pass the savings on to the Tier 1 manufacturers. Conversely, he says, to the extent that the prices were artificially raised, economic theory dictates that, in order to survive, the Tier 2 manufacturers would have passed on the higher prices to the Tier 1 manufacturers. Therefore, he argues, the Tier 2 manufacturers cannot have suffered a loss as a result.

[127] Effectively, DuPont's U.S. expert argues passing-on as a defence, both in a novel, reverse, "grinding-down" fashion, and in its conventional sense. In *Hanover Shoe Inc. v. United Shoe Machinery Corp*., 392 U.S. 481 (1968), the U.S. Supreme Court held that where the plaintiffs were direct purchasers from the defendants, the defendants could not use the defence that the alleged over-charge had been passed through to the ultimate consumer and therefore that the direct purchaser had suffered no damage. The Supreme Court of Canada recently rejected passing on as a defence to a claim for restitution in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007] S.C.J. No. 1, and noted with approval LeBel J.'s criticism of its application in tort law in *British Columbia v. Canadian Forest Products Ltd.,* [2004] 2 S.C.R. 74, viewing the defence as both economically misconceived and creating serious difficulties of proof.

[128] In *Chadha v. Bayer*, the plaintiff alleged price-fixing of iron oxide pigments used to colour bricks. The proposed class action was brought on behalf of indirect purchasers

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of the pigments: homeowners and other end-users of bricks. The class was not limited to end-users of bricks containing the iron oxide pigments at issue. The Court of Appeal found that there was not sufficient evidence to support a conclusion that loss, as a component of liability, could be proved on a class-wide basis, and was therefore a common issue and that as the only common issues were the price-fixing conspiracy and, possibly, the measure of damages, if the scope of liability could be determined, a class action was not the preferable procedure. The plaintiff's expert's models for calculating damages were based on the assumption of a full pass-through of the price increase of the iron oxide to the homebuyers. The Court of Appeal noted that such assumption was the very issue that it had to be satisfied was provable by some method on a class-wide basis before finding loss a common issue.

[129] The Court of Appeal contrasted the evidence in *Chadha* with that before the U.S. Federal Court of Appeals in *In Re: Linerboard Antitrust Litigation*, 305 F. 3d 145 (2002). That case involved allegations by direct purchasers of products containing linerboard, which is essentially corrugated cardboard, that manufacturers conspired to reduce industry inventory of corrugated cardboard and then, once supply was limited, to implement a price increase. Feldman J.A. commented, at para. 32 of *Chadha*, that while class members in *Linerboard* were direct purchasers, because the linerboard was only a component of the corrugated cardboard sheets and boxes purchased by class members, the issue of whether the conspiracy affected the price of these products on a class-wide basis was a live issue. This comment suggests that where a class member alleging a horizontal price-fixing conspiracy is a direct purchaser of the very product with respect to which the price-fixing is alleged to have occurred, and not of something of which that product is merely a component, the proof of class-wide loss may not be an issue.

[130] Feldman J.A. considered that in *Linerboard*, both what is called the "presumed impact theory" and expert evidence formed the evidentiary basis for the court's conclusion that loss could be proved on a class wide basis. She noted at para. 35 of *Chadha*, "In applying the concept of presumed impact, the court takes notice of the laws of economics as support for the theory that an individual plaintiff can prove the fact of damage simply by proving that the free market prices would be lower than the prices actually paid by the plaintiff. In the *Linerboard* case, a deliberate cut in supply was alleged. A reduction in supply will cause prices to rise. The concomitant rise in linerboard prices in the relevant market, on the presumed impact theory, represents the laws of supply and demand at work." The plaintiffs also adduced expert evidence, disputed by the defendant's expert, that, based on an analysis of pricing data and company records, the alleged unlawful conduct would have impacted all members of the class through higher prices, notwithstanding variations in purchasers, products, regions, and so on.

[131] This case is different than *Chadha,* where the plaintiffs sought to rely on the passing-on of loss to indirect purchasers to establish damage. Here, the class members are direct purchasers and passing-on may be raised as a defence. Axiom does not rely on an assumption of passing-on. The possibility that the defence of passing on might prevail at trial does not mean that there cannot be some basis in fact for finding that class members suffered loss.

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[132] This case is also different from *Price*, a decision of the Superior Court, released before the Court of Appeal's decision in *Chadha*.

[133] In *Price,* the plaintiffs alleged that the defendant, Panasonic, had engaged in resale price maintenance in respect of eight categories of audio-visual consumer electronic products and brought a proposed class action on behalf of an estimated 20 million end-purchasers. Shaughnessy R.S.J. (as he then was) concluded that a class proceeding was not manageable and not the preferable procedure. He found that the nominal price at which the products were sold did not reflect the "real price"; dealers often included "extras" such as stands, speaker wire, cases, tapes and batteries, as well as extended warranty service, which had the effect of reducing the purchase price attributable to the products at issue. Therefore, the actual price at which a product was sold to a consumer had in each case to be determined individually. Shaughnessy R.S.J. similarly found that the "but for" price would also have to be determined individually with respect to each transaction and loss was accordingly not a common issue. It appears that the only evidence proffered by the plaintiff as to how the "but for" price might be determined was a British newspaper article suggesting that British consumers were paying 15-20% too much for consumer electronic products because of price collusion.

[134] DuPont's evidence is that it provided added value to its customers and potential customers, by, for example, assisting them with the design and testing of their products, parts and process problem solving, and part failure trouble-shooting, and that not all of its competitors did so. Its counsel appears to argue that these are tantamount to the "extras" in *Price* and, as in *Price*, this will necessitate individual determination of the "actual" and "but for" prices. The "value adds" are intangible, and some are provided to persons who are not customers. They are not comparable to those in *Price*.

[135] I have, however, concluded that loss, as a component of liability, is not a common issue in the case of the full, broadly defined class, and the alleged CUPS conspiracy.

[136] Axiom in essence argues that loss should be presumed simply because class members are direct purchasers. It does not point to a cut in supply, orchestrated by all manufacturers, as was alleged to be the case in *Linerboard.* Members of the class include persons who were not required to purchase DuPont resins. I was not directed to any laws of economics, or provided any expert evidence, to the effect that the alleged conduct would have any impact on prices charged by competing manufacturers. While DuPont is a major manufacturer, as noted at the outset of these reasons, DuPont has at least 16 competitors for engineering resins in Canada. In addition, engineering resins can be obtained from foreign competitors. Both parties submitted evidence about the fiercely competitive nature of the automotive industry, and its supply chain. Nor was I directed to any laws of economics, or provided any expert evidence, to the effect that where a major manufacturer of a product engages in price-fixing in respect of its own products, a sophisticated, large scale, purchaser, who has the choice of buying that manufacturer's product, or a competing product of another manufacturer, major or otherwise, and chooses to buy the product of the manufacturer engaging in price-fixing, would be unable to negotiate competitive prices.

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[137] I am, however, satisfied, on basic economic principles, that in the case of persons required by their customers to buy DuPont resins, there would be, as a result of that requirement, some basis in fact that each such person suffered some loss as a result of the alleged vertical, price-fixing CUPS conspiracy.

[138] The requisite "some basis in fact" is, in my view established, notwithstanding Axiom's concession, pointed to by DuPont, that at certain points in the class period DuPont's distributors' prices for a number of DuPont's engineering resins were competitive with the prices at which Axiom could acquire DuPont resins from the "grey market". Prices charged by the distributors might influence prices charged by the "grey market". The "grey market" may not be the appropriate control group for the determination of "but for" prices.

[139] *Markson* does not affect my conclusion that loss is not a common issue as a component of liability with respect to the broadly defined class.

[140] *Markson* involved allegations that a financial institution received interest on cash advances in violation of s. 347(1)(b) of the *Criminal Code*. MBNA Canada Bank charged a transaction fee, in addition to compound interest, on every cash advance from its credit cards. Restitution was sought. Whether, if the transaction fee amounted to "interest", the interest rate charged exceeded the 60 percent maximum interest rate prescribed by s. 347 of the *Criminal Code* depended on the activity in the cardholder's account and the timing of the repayment.

[141] The motions judge denied certification, finding that it was unlikely that an electronic system could be developed to identify the transactions on which an effective interest rate exceeding 60 percent was paid. Rather, it was likely that millions of transactions would have to be examined manually to determine liability. The Divisional Court found that a common trial would not adjudicate a substantial part of each class member's claim and upheld the motion judge's decision

[142] On appeal to the Court of Appeal, the plaintiff recast its case to take advantage of ss. 23 and 24 of the CPA. Those sections permit the admission of statistical information as evidence to determine issues relating to the amount or distribution of a monetary award under the CPA and permit the court to determine a defendant's liability to class members on an aggregate basis, respectively.

[143] Rosenberg J.A. found that if the requested declaratory relief was granted, liability to *some* class members would be established, and some class members would be entitled to a remedy. He held that those two factors- liability and entitlement to a remedy- were sufficient to trigger the application of ss. 23 and 24 of the CPA. Section 24 of the CPA does not apply unless "no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability". Rosenberg J.A. held that this requirement is satisfied where *potential* liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual circumstances. He distinguished *Chadha v. Bayer*. The issue there, namely whether or not the result of the defendant's allegedly illegal acts was passed through

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to the consumers who made up the proposed class, could not be addressed by ss. 23 and 24 of the CPA.

[144] Like *Chadha v. Bayer*, this case involves an issue that cannot be addressed by ss. 23 and 24 of the CPA, namely, whether or not persons not required to buy DuPont resins, and to whom alternative suppliers were available, but who chose to buy DuPont resins, suffered loss as a result of the CUPS system. The roadblock to certification in *Markson* was what the motions judge found was the likelihood that manual calculations would have to be undertaken in respect of millions of transactions to determine which offended the *Criminal Code*. Essentially mathematical calculations were at issue in *Markson*. The issue in this case, in respect of the full, broadly defined class and the alleged CUPS system conspiracy, is qualitatively different.

[145] Nor does Ms. Sanderson's opinion affect my conclusion that loss, as a component of liability, is not a common issue in the case of the full, broadly defined class, and the alleged CUPS system conspiracy.

[146] Her opinion addresses whether there is a method for calculating the prices that Tier 2 manufacturers who paid the fixed prices agreed upon by DuPont and Tier 1 manufacturers would have paid for DuPont resins had DuPont not entered into Tier 1 Agreements. She opines that the requisite data is likely available from DuPont and that there are three widely-accepted methodologies for determining "but-for" prices in the case of Tier 1 Agreement class members: comparing prices during the period of alleged conspiracy to prices in the same market before or after the alleged conspiracy (the "before and after approach"); comparing prices during the period of alleged conspiracy to prices during the same time period in similar markets that were unaffected by the conspiracy (the "yardstick or benchmark approach"); and using econometric modelling to predict what prices would have been absent the alleged conspiracy (the "price prediction approach").

[147] Ms. Sanderson further opines that once the but-for prices are established, a process called multiple regression analysis can be employed to isolate the impact of the conspiracy from other changes in demand and cost conditions that may affect the comparison between the conspiracy prices and the control group. Specifically, she opines that the fact that the Tier 1 Agreements provide for a range of rebates, depending on the year, product and sometimes the volume purchased, does not mean that a class wide methodology cannot be employed to determine Tier 2 but-for prices.

[148] Ms. Sanderson's opinion, like Professor Hughes', was provided when the proposed class was restricted to purchasers of resins "for use in parts manufactured…for supply to a Tier 1 automotive manufacturer", and before Axiom broadened the proposed class to include all purchasers of resins for an automotive application, regardless of tier. Her opinion does not address whether or not this methodology could be applied to Tier 2 manufacturers whose prices were not fixed under a Tier 1 Agreement even though, at the time her opinion was provided, the proposed class included such persons. Nor does it address whether it could be applied in the case of CUPS system class members. It addresses only a subset of transactions, with a subset of the proposed class members. In fact, Ms. Sanderson suggests that Tier 2 manufacturers who bought resins directly from DuPont,

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and, after adjusting for relevant differences between Tier 1 and Tier 2 manufacturers, Tier 1 manufacturers who bought DuPont resins, are possible control groups "for determining but-for prices". These suggested control groups are part of both the Tier 1 Agreements subclass and the proposed class. Counsel for Axiom submits that the same methodology could be applied to the CUPS system. With the broadened class definition, it is not clear who would comprise the control group.

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[149] As I indicated above, Professor Hughes challenges Ms. Sanderson's opinion that damages can be computed on a class-wide basis. He argues that transactions for DuPont resins are idiosyncratic, depending on, among other things, size, credit risk, and the time of the transaction. He also submits that class members who are small Tier 2 manufacturers are likely to pay higher, rather than lower, resin prices in the but-for world. He submits that the methodology proposed by Ms. Sanderson presents various difficulties, and that determination of "but-for" prices would require a highly individualized, fact-intensive inquiry entailing consideration of numerous pricing and purchasing factors that are unique to each potential class member. DuPont's evidence is that this litigation involves six "families" of engineering resins, and that there are numerous grades and generations within each, resulting in over 200 variants.

[150] Despite the deficiencies in Ms. Sanderson's opinion, and Professor Hughes' criticism of it, I am satisfied that Ms. Sanderson's opinion provides some basis in fact that how damages, or restitutionary payments, are to be computed could, in respect of a narrowed class comprised of persons required to buy DuPont resins, constitute a common issue. With a narrowed class, it should not be difficult to establish a control group. Should the common issues judge not be satisfied that this is the case, and be of the view that the individual issues were not manageable, the proceeding could be de-certified.

(6) *Proposed Common Issue 10: Punitive Damages*

[151] While punitive damages are not awarded under s. 36 of the *Competition Act* (see *Wong v. Sony Canada*, *supra*, at paras. 16-18), Axiom has pleaded the separate cause of action of civil conspiracy.

[152] Whether the conduct of the defendant justified an award of punitive damages was accepted as a common issue in *Cloud v. Canada (Attorney General)* (2005), 73 O.R. (3d) 401 at para. 72 (C.A.), *Healey v. Lakeridge Health Corp.*, [2006] O.J. No. 4277 at para. 103 (S.C.J.) and *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 at paras. 97-98 (S.C.J.) and *Serhan Estate v. Johnson & Johnson* (2006), 269 D.L.R. (4th) 279 at paras. 126-130 (Ont. S.C.J. [Div. Ct.]).

[153] The claim is based on DuPont's alleged conduct towards class members, in the face of its alleged knowledge that the environment in which class members operate is highly competitive and the cost of its resins is an overriding determinant of class members' survival and prosperity. Common issues of fact in relation to DuPont's conduct and knowledge are involved.

[154] In this case, punitive damages can be determined as a common issue, if the conspiracy claim is a common issue. As indicated above, I have concluded that, based on the broad definition of the class proposed, it is not.

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VII 5(1)(d): PREFERABLE PROCEDURE

(1) *The Test*

[155]

> [T]he preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members.
> (*Cloud* at para. 73)

[156] The question of preferability takes into account the importance of the common issues in relation to the claims as a whole. *Hollick* at para. 30.

[157] The analysis of the preferable procedure, "should be conducted through the demands of the three principal advantages of class actions - judicial economy, access to justice, and behavior modification…" *Hollick* at para. 27.

(2) *The Parties' Positions*

[158] Axiom argues that given the possible class size of up to 216 moulders, judicial economy would be served, and the risk of inconsistent judicial decisions would be avoided, by certifying this action.

[159] It also argues that doing so would achieve access to justice. Mr. Rizzo, a principal of Axiom, deposes that he understands that most plastic processors are small to medium sized enterprises, and refers to an American document from February 2004, republished on a Statistics Canada website, which indicates that the Canadian plastic products sector - which includes manufacturers of products ranging from plastic bags and polystyrene foam products to what is at issue in this case, namely plastic motor vehicle parts, destined for the packaging, construction and electronics sectors, as well as the automotive sector - is characterized by a large number of small and medium sized enterprises as substantiating this. He asserts that Tier 2 manufacturers are in a dire financial situation, and refers to newspaper articles written in the period December 22, 2004 to March 10, 2005 to such effect. Counsel for Axiom argues that such enterprises cannot afford the investment of time and money required to advance a case of this nature, against a "Goliath" such as DuPont, and there is no reasonable alternative to a class proceeding. Certification is necessary, it argues, to hold DuPont to account, and achieve behaviour modification.

[160] DuPont submits that the individual issues dwarf the common issues and this action would not be manageable as a class proceeding, and therefore, as it would disintegrate into a multitude of individual actions, cannot promote judicial economy.

[161] Moreover, it argues that Axiom has failed to establish "some basis in fact", as required by *Hollick*, that a class proceeding is the preferable procedure, and achieves the objective of access to justice. DuPont points to the fact that all class members are corporations, and to the failure of Axiom to explain why large Tier 1 manufacturers, such as Siemens, which is described as a billion dollar conglomerate, included in the proposed class would be unable to prosecute their claims on an individual basis if they were being harmed by the alleged conspiracies.

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[162] DuPont also points to the fact that in a separate, individual action Axiom has sued Intier, and succeeded in obtaining an interlocutory injunction, and argues that Axiom can pursue an individual action against DuPont, just as it has against Intier. In that action (Court File No. 05-CV-281689 PD2), Axiom seeks damages against Intier for breach of contract. It alleges, among other things, that Intier prematurely terminated its supply agreements with Axiom so that Intier can source products from cheaper suppliers, including Asian manufacturers. In its Amended Statement of Claim in that action, Axiom pleads that: it acquired the DuPont resins specified by Intier from a lawful source, other than DuPont or one of its authorized Canadian distributors (what DuPont calls the "grey market"); as a consequence Intier was denied rebates by DuPont; and Intier retaliated by putting into motion a plan to terminate all of its contracts with Axiom. Axiom openly admits in this proceeding that it purchased DuPont resins from a source other than DuPont or one of its three authorized Canadian distributors because it was able to obtain a significantly better price. In February 2005, Axiom secured an interlocutory injunction preventing Intier from terminating all of its supply agreements with Axiom before trial. In that action, Axoim does not allege Intier violated the *Competition Act*, or advance a related claim of civil conspiracy.

[163] Finally, DuPont submits that the proposed class action is not necessary to achieve the goal of behaviour modification; conduct contrary to ss. 45 or 61 of the *Competition Act* is an indictable offence, and offenders are subject to imprisonment for up to five years, or a fine, capped at $10 Million in the case of s. 45. In *Chadha v. Bayer,* Feldman J.A. found, at para. 62, that the criminal sanctions provided for in the *Competition Act* achieved the goal of behaviour modification. In *Price*, in concluding that a class proceeding was not the preferable procedure, Shaughnessy R.S.J. similarly considered that behaviour modification could be achieved through the Competition Bureau. The Competition Bureau is primarily responsible for enforcement of these sections. Axiom's representative, Mr. Rizzo, refused to answer whether Axiom has made a complaint to the Competition Bureau.

(3) *Analysis and Conclusion*

[164] Counsel for Axiom says the "CUPS system" is the heart of its case.

[165] On the basis of the class as defined, I have concluded that proposed common issue 4, arising out of s. 61(1) of the *Competition Act*, is a common issue in respect of the CUPS system and that the balance of the proposed common issues, including whether class members have suffered damage as a result of the alleged breach of s. 61(1), which is comprised in proposed common issue 6, are not "common". If, however, the class were restricted to persons required by a customer to buy DuPont resins, proposed common issues 1

through 3, 5, 6, 7, 8, and 9 would also be common with respect to the CUPS system. This narrowed class would be broader than the Tier 1 Agreements subclass; it is not restricted to moulders who supplied a Tier 1 manufacturer who is a party to a Tier 1 Agreement.

[166] As directed by *Hollick*, I have taken into account the importance of the common issues in relation to the claims as a whole.

[167] Conditional upon the class definition being so amended, the importance of the common issues in relation to the claims as a whole weighs in favour of certification.

[168] I am satisfied that a class action would be a fair, efficient and manageable method of advancing Axiom's claim, if the class definition was amended, as provided above, and the common issues were amended to delete reference to the rebate agreements (Tier 1 Agreements, in these reasons). A class action would not be efficient or manageable if, as a result of the broad definition of the class, individual proof that loss was incurred, and the amount of the loss, was required, or if the claims relating to the Tier 1 Agreements were included.

[169] Individual actions would in my view be a more efficient and manageable way of advancing the claims in relation to the Tier 1 Agreements. Arrangements could be made for individual actions by moulders arising out of the same Tier 1 Agreement to be heard together, or one after the other, or for affected moulders to jointly pursue a claim. "Mini class actions" in relation to the various Tier 1 Agreements do not appear to me a preferable procedure. As discussed above, in the case of the Tier 1 Agreements with the Magna entities it will have to be determined, in respect of each affected moulder, whether it was advised of the rebate structure. Each "mini class" in relation to the other Tier 1 Agreements may affect only a small number of moulders. I suspect they would be a more complicated, and accordingly more costly, way of pursuing those claims, and am therefore not satisfied that they would promote judicial economy or, given the possible increased cost, and small class or subclass size, access to justice. Axiom has a list of possible class members. It could ascertain if others wish to participate, promote joint efforts where efficient to do so, and share common costs.

[170] DuPont says Axiom's allegations raise individual limitation defences. Under s. 36(4) of the *Competition Act*, a plaintiff must bring a private action for damages arising from alleged criminal conduct under Part VI within two years from "a day on which the conduct was engaged in". To the extent that these issues are individual, I believe they are manageable and do not affect my conclusion.

[171] I am also satisfied that if the class definition were so amended, and the scope of the common issues reduced, as provided above, a class proceeding would be the preferable procedure. Constrained in this manner, it would be preferable to numerous individual actions in relation to the CUPS system, and judicial economy would be promoted. Judicial economy is the primary reason for certifying this action as it relates to the CUPS system. I am not convinced that, if not so constrained, judicial economy would be achieved by certifying this action.

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[172] Modifying the claim in this manner would also likely result in the class being comprised primarily of Tier 2 manufacturers, who, according to Axiom's evidence, have been in dire financial straits. The evidence is that engineering resins are the single largest cost component of a moulder's manufacturing process and comprise 35-70% of the total piece price. Unlike *Chadha v. Bayer*, the amounts at issue for each class member are not minimal. Therefore, access to justice can be seen as more important in this case. The fact that proposed class members are corporations does not, in and of itself, mean that a class proceeding is not appropriate. Nor does the fact that some class members, such as Axiom, may have the wherewithal to advance individual claims. Litigation in relation to the CUPS system claims will be costly; more costly, I suspect, than both litigation in relation to the Tier 1 Agreements and Axiom's litigation against Intier. With the constrained class definition, many members may be unable to finance this litigation on an individual basis. I am satisfied that with the proposed changes, the objective of access to justice will also be promoted.

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[173] In this case, behaviour modification does not weigh in favour of certification. As pointed out in *Chadha v. Bayer* and *Price*, that objective can be met by the criminal sanctions provided for in the *Competition Act.* There was no evidence that the Competition Bureau does not pursue alleged violations.

VIII 5(1)(e)(i) and (iii): THE REPRESENTATIVE PLAINTIFF

[174] The Court must be satisfied that the proposed representative will vigorously and capably prosecute the interests of the class. *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 94 Alta. L.R. (3d) 1 (S.C.C.).

[175] Axiom submits that in advancing this proceeding to date, it has demonstrated that it will vigorously and capably prosecute the interests of the class, and that there are no conflicts between it and other class members.

[176] DuPont submits that the litigation that Axiom has commenced against Intier, referred to in Part VII(2) above, shows that Axiom has particular interests at stake that other class members may not share, and that Axiom is accordingly not an appropriate representative plaintiff.

[177] Counsel for DuPont says it appears that Axiom has not purchased resins from DuPont or one of its distributors since 2002, and therefore would not adequately represent the interests of class members who allegedly experienced a loss from 2003-2006.

[178] Counsel for DuPont also argues that because Axiom was historically a Tier 2 manufacturer, its interests are in conflict with class members who are Tier 1 and Tier 3 manufacturers. As a Tier 2 manufacturer, it will have an interest in arguing that it did not pass on its loss, through higher prices, to the Tier 1 manufacturers, whereas Tier 1 manufacturers who are class members may wish to argue that the loss was passed on to them. As against the Tier 3 manufacturers, it would have the opposite interest, and would want to argue that the loss was passed on to it.

[179] Finally, DuPont says that Axiom is in conflict with the class with respect to the class period. Axiom's President, Mr. Rizzo, held a senior management position at WindoMotion, an alleged co-conspirator, in 1998 and 1999. Accordingly, DuPont submits, Axiom has a clear interest in refraining from pursuing claims prior to 2000 as Mr. Rizzo would have been a potential party to the alleged conspiracies.

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[180] Axiom has retained very competent and experienced counsel, and has vigorously and capably pursued this litigation. I am satisfied that Axiom will fairly and adequately represent the class, as narrowed, and does not have, on the revised common issues for that class, an interest in conflict with the interests of other class members.

[181] I have concluded that the claims in relation to the Tier 1 Agreements should not be certified. Hence, there is no risk that the broader class could be seen as financing the distinct claims that could only be advanced by a small subset of the class, including Axiom.

[182] The fact that Axiom has sought recourse against Intier for alleged breach of contract does not affect its ability to represent the narrowed class in the separate claims advanced against DuPont arising out of the CUPS system or create an interest in conflict with those of other class members on the common issues.

[183] The fact that Axiom may not have sustained a loss throughout the class period does not in my view affect its ability to act effectively as representative plaintiff.

[184] As to the alleged conflict arising because Axiom was primarily a Tier 2 manufacturer during the class period, the class is defined as direct purchasers of resins. Tier 1, 2 and 3 manufacturers who are class members are not in conflict; claims are not advanced in the litigation for loss sustained by indirect purchasers and, as direct purchasers, none will have an interest in advancing a passing-on argument. Moreover, the constrained class definition I have provided for will likely also largely address this alleged conflict.

[185] As to DuPont's argument that Axiom has a conflict arising from Mr. Rizzo's prior involvement with WindoMotion, WindoMotion is not an alleged co-conspirator in the CUPS system conspiracy, and I propose that this action be certified only in relation to the CUPS system conspiracy. While I have concluded that claims relating to the Tier 1 Agreements should not proceed as a class proceeding, DuPont did not, in any event, adduce evidence that there is a Tier 1 Agreement covering a period prior to 2000. DuPont presumably would have knowledge of any such agreement. On the evidence before me, in the case of the Tier 1 Agreement conspiracy, there does not appear to be a conflict.

IX 5(1)(e)(ii): A WORKABLE PLAN

[186] DuPont argues that Axiom's litigation plan consists of no more than a recitation of the steps that occur in the course of any litigation and has two glaring defects: it does not set out how Axiom will get the evidence of DuPont's alleged co-conspirators, and does not deal with how Axiom will contend with the individual issues remaining after determination of the common issues. It merely states that Axiom does not anticipate any individual issues.

[187] Axiom submits that its litigation plan compares favourably with the litigation plans approved in *Pearson v. Inco,* its case is “DuPont centred”, its litigation plan is a work in progress and, at this stage, it is too early to set out a detailed plan as to how individual issues will be dealt with. Axiom submits that if I have concluded that a class proceeding is the preferable procedure, I should find its plan workable, as long as it does not undermine that conclusion.

[188] Axiom’s plan is what I would describe as a “generic” plan, and is out of date. It proposes, for example, that the certification hearing be held June 12, 2006. It does, however, at this stage, set out a workable method of advancing the proceeding, given the reduction in the class definition, and the exclusion of the Tier 1 Agreements from the class proceeding. The plan did not set out a workable method of advancing the proceeding on behalf of the broadly defined class proposed.

[189] While the plan sets out a “workable” plan for notifying class members, a better plan may be possible. This, together with the opt-out period, should be addressed at a case conference to settle the form of the certification order and Notice of Certification.

[190] I understood counsel for Axiom to indicate that, following certification, the litigation plan would be amended to address how individual issues be dealt with. This should also be addressed at the case conference.

X COSTS

[191] Subject to the following, Axiom shall provide submissions as to costs within 21 days. DuPont shall provide responding submissions within 14 days thereafter. Submissions shall not exceed 10 pages in length, and no reply submissions shall be provided, in each case, without leave. Implementation of this timeline may be delayed until after the form of the certification order and Notice of Certification are settled, should counsel consider advisable.

Hoy J.

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

AXIOM PLASTICS INC.

- and -

E.I. DUPONT CANADA COMPANY

REASONS FOR DECISION

Hoy J.

Released: August 27, 2007