



PERSPECTIVE

Class Action First In Canada

Contested Price-Fixing Class Action Including Indirect Purchasers Certified For First Time By A Canadian Court

October 7, 2009

On September 28, 2009, the Ontario Superior Court of Justice issued the first decision by a Canadian court in a contested case certifying a price-fixing class action on behalf of a class which includes indirect purchasers. In *Irving Paper Limited et al. v. Atofina Chemicals Inc. et al.*, The Honourable Madam Justice Rady certified under the Ontario *Class Proceedings Act* (the "CPA") a class action on behalf of all persons in Canada (excluding the defendants) who purchased hydrogen peroxide, products *containing* hydrogen peroxide or products *using* hydrogen peroxide in Canada between January 1, 1994 and January 5, 2005. If left undisturbed on appeal, the decision could significantly broaden the scope in Ontario for indirect purchaser, price-fixing class actions. It could also mean that class action law in Ontario will be inconsistent with the law and practice in other Canadian jurisdictions (such as British Columbia) where courts have refused to certify proposed indirect purchaser price-fixing class actions and with U.S. federal law which bars indirect purchasers from making damages claims.

The Claim

In *Irving Paper*, the plaintiffs allege that the defendants conspired to, and did in fact, allocate markets, restrict supply and increase the price of hydrogen peroxide in Canada over an 11-year period. The plaintiffs have asserted claims for general and punitive damages based on the common law tort of conspiracy, the statutory cause of action for damages under section 36 of the *Competition Act* (Canada) and the tort of intentional interference with economic interests. The last of these three causes of action was not pursued at certification.

Hydrogen peroxide is an inorganic chemical, differentiated in grade and concentration, that is used in many different applications as a bleaching or oxidizing agent. The pulp and paper industry, which uses hydrogen peroxide in the pulp bleaching process, is the largest North American consumer of the chemical. Hydrogen peroxide is also used in a wide variety of other industries and applications, including mining, chemical manufacturing, textile bleaching, wastewater treatment and food processing.

As noted, the class in *Irving Paper* consists of both direct purchasers (*i.e.*, persons who allegedly purchased hydrogen peroxide from one or more of the defendants) and indirect purchasers (*i.e.*, persons who allegedly purchased hydrogen peroxide or products containing or using hydrogen peroxide from someone other than a defendant). As Justice Rady acknowledged, the class is enormous and could conceivably include all residents of Canada.

The Certification Decision

The key issue on the motion for certification was whether the plaintiffs had demonstrated that there was a workable methodology for establishing loss or harm on a class-wide basis, such that harm and damages were "viable and appropriate common issues". Proof of loss or harm is a required element for liability pursuant to both the tort of conspiracy and section 36 of the *Competition Act*. Without a workable methodology, the need for individualized inquiries to determine liability to each of the millions of class members would make the proposed class action unmanageable and therefore not the preferable procedure or appropriate for certification.

Decisions prior to *Irving Paper*, in both Ontario and other provinces (such as British Columbia), had denied certification in similar cases on the ground that the plaintiffs had failed to adduce sufficient evidence to support a methodology for calculating harm on a class-wide basis. In those cases, defendants had argued successfully that (i) the issue of whether indirect purchasers had in fact suffered any loss as a result of any alleged overcharges could not be determined on a class-wide or common basis, and instead required complex and lengthy individual trials to determine whether the alleged overcharges had, in fact, been passed through to each of the indirect purchasers; and (ii) these individual inquiries would overwhelm any common issues, with the result that a class action was not the preferable procedure.

The seminal case in Canada on indirect purchaser class actions is the decision of the Ontario Court of Appeal in *Chadha v. Bayer Inc.* That case involved a proposed class action on behalf of indirect purchasers alleging that the defendant manufacturers had, *inter alia*, conspired contrary to section 45 of the *Competition Act* to fix the price of iron oxide pigments – additives used to colour concrete bricks and paving stones used in home construction. In concluding that the proposed class action should not have been certified at first instance, the Court of Appeal found, among other things, that the certification motion judge had erred in certifying liability as a common issue. Noting the "many problems of proof facing the [plaintiffs] with respect to the pass-on issue, including the number of parties in the chain of distribution and the 'multitude of variables' which would affect the end-purchase price of a building", the appellate court found that the plaintiffs had not shown that there was a "method [that] could be used at a trial to prove that all end-purchasers of buildings constructed using some bricks or paving stones that contain the respondents' iron oxide pigment overpaid for the buildings as a result". In the Court's view, the absence of an acceptable methodology meant that individual trials would be needed to establish loss (and therefore liability), with the result that the proposed class action would become unmanageable, and would not therefore be the preferable procedure.

In *Irving Paper*, Justice Rady relied on two more recent decisions of the Ontario Court of Appeal – *Markson v. MBNA Canada Bank* and *Cassano v. The Toronto Dominion Bank* – to frame her analysis of the issue. In her view, these two decisions have overtaken *Chadha* and signal a relaxation of the evidentiary threshold prescribed by *Chadha*. Among other

things, Her Honour interpreted *Markson* as establishing "that not every class member need have suffered a loss and so it is not necessary to show damages on a class-wide basis". Justice Rady also relied on the Ontario Superior Court's 2004 decision in *Hague v. Liberty Mutual Insurance Co.* and the Ontario Court of Appeal's decision in *Cloud v. Canada (Attorney General)* as authority for the proposition that she was not required to reconcile the conflicting expert opinions before her regarding the existence of a workable class-wide means to prove liability.

Based on the foregoing, Justice Rady concluded that at the certification stage "[she] need only be satisfied that a methodology *may* exist for the calculation of damages" and that "attempts to postulate such a methodology" are sufficient [emphasis added]. In her view, the plaintiffs had satisfied this threshold:

"[A]t this stage of the proceedings and on the strength of the evidentiary record as it exists today, I simply am unable to say that [the plaintiffs' expert's] opinion will not be accepted by a court. I am also mindful that the parties have not yet had documentary or oral discovery and I think it quite likely that material produced by both the settling and non-settling defendants will be significantly important to the experts in refining their analysis of damages. It is simply not possible at this stage of the proceeding to determine whose opinion is to be preferred."

In reaching this conclusion, Justice Rady also appears to have taken comfort from her belief that the pass-through issue might not arise at trial and that if it did it was unclear whether it would impact damages.

Justice Rady also pointed to the defendants' failure to identify their own "alternate procedure" to the proposed class action in concluding that a class action was the preferable procedure. Based on her interpretation of the Court of Appeal's decision in *Markson*, she found that it was not open to the defendants to argue that "no litigation was preferable to a class proceeding".

Discussion and Implications

The *Irving Paper* decision raises several important issues which may be addressed by the Divisional Court (and, ultimately, by the Ontario Court of Appeal) on the expected appeal from Justice Rady's certification decision. Among other things, *Markson* and *Cassano* were very different cases than *Irving Paper*. Neither *Markson* nor *Cassano* was a price-fixing case, and neither involved indirect purchasers or a pass-through issue. Also, in neither case (which were in essence dealing with contractual claims) was damage or loss a constituent element of liability, which it was in *Irving Paper*. In other words, neither case had to consider the key certification issue in *Irving Paper*, namely whether the alleged overcharge had, in fact, been passed through to indirect purchasers thereby causing them to suffer damage or loss, and whether the plaintiffs could prove the fact of such damage or loss on a class-wide basis. Further, nothing in *Markson* or *Cassano* suggests that the CPA alters the essential elements of causes of action or, more particularly, relieves plaintiffs of the obligation of proving all of the essential elements of liability, which in *Irving Paper* included the requirement to prove that indirect purchasers in the class have actually suffered damage or loss as a result of the alleged price-fixing conspiracy.

Second, based on her reading of *Markson* and *Cassano*, Justice Rady appears to have adopted a more relaxed, less rigorous approach to the determination of whether there is a viable and workable methodology capable of establishing harm on a class-wide basis in indirect purchaser cases. There is no suggestion in either *Markson* or *Cassano*, however, that they were intended by the Court of Appeal to "overtake" *Chadha* or to "relax" the evidentiary requirement prescribed by the Court of Appeal in that decision. The approach in the *Irving Paper* decision is also at the opposite end of the spectrum from the approach taken in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, a 2008 decision of the British Columbia Supreme Court, where that Court followed *Chadha* and stated:

"In a case such as this where the context is pass through, the court must be persuaded that there is sufficient evidence of the existence of a viable and workable methodology that is capable of relating harm to Class Members. [...] *Given the inherent complexities, the scrutiny cannot be superficial. The evidence must establish that the proposed methodology has been developed with some rigour and will be sufficiently robust to accomplish the stated task.*" [emphasis added]

Third, Justice Rady's comment that the pass-through issue might not arise at trial, or might not affect damages even if it did arise, is difficult to understand in the context of a price-fixing class action where the class includes indirect purchasers, liability to whom is contingent on a finding that the alleged overcharge was, in fact, passed on to them. The decision appears to conflate the question of the availability to the defendants of what is known as the "pass-through defence" (pursuant to which defence defendants argue that direct purchasers suffered no harm because any overcharge paid by them was subsequently passed through in its entirety to indirect purchasers) with the *Irving Paper* plaintiffs' obligation, in order to discharge their burden of establishing the defendants' liability to them, to prove that the alleged overcharges were actually passed through to and did reach indirect purchasers. This second kind of pass-through *will* have to be considered by the trial judge and it *will* impact damages.

Finally, in relying on the defendants' failure to identify "an alternate procedure", Justice Rady appears to have imposed a form of reverse onus on the defendants under the preferable procedure criterion of the test for certification in section 5 of the CPA. This is inconsistent with the Supreme Court of Canada's decision in *Hollick v. Toronto (City)*, where the Court concluded that, with the exception of the requirement that the pleadings disclose a cause of action, a plaintiff has the onus to demonstrate "some basis in fact" for each of the requirements of the certification test, including preferable procedure.

The long-term impact of the decision in *Irving Paper* remains to be seen but, as noted above, could potentially be dramatic. Much will depend on any appellate review in this case, as well as on the British Columbia Court of Appeal's pending decision in *Pro-Sys Consultants Ltd.*

*The foregoing is a summary of a recent development in Canadian competition and class action law. For additional information about this topic or any other aspect of Canadian competition or class action law, please contact [George Addy](#), [Kent Thomson](#), [Sandra Forbes](#), [Davit Akman](#) or [Jessica Norman](#) in the Toronto office at (416) 863-0900 or [Guy Du Pont](#) or [Nick Rodrigo](#) in the Montréal office at (514) 841-6400. Davies Ward Phillips & Vineberg LLP is counsel for Kemira OYJ and Kemira Chemicals Canada Inc. (together, "Kemira") in connection with the *Irving Paper* case. Davies was intimately involved in the*

defence of the certification motion until just before the hearing of that motion, when Kemira reached a settlement.

Davies Ward Phillips & Vineberg LLP, with over 240 lawyers, practises nationally and internationally from offices in Toronto, Montréal and New York and is consistently at the heart of the largest and most complex commercial and financial matters on behalf of its North American and overseas clients.

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