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AGGREGATE ASSESSMENT OF DAMAGES ALLOWS CERTIFICATION OF CONSPIRACY CLASS ACTIONS, COURTS HOLD

*Irving Paper Ltd. v. Atofina Chemicals Inc.*¹ and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*²

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In two recent decisions, the Ontario Superior Court and the British Columbia Court of Appeal relied on the aggregate damages provisions of the *Class Proceedings Act*⁴ in their respective provinces to certify class actions seeking damages for alleged conspiracies to fix prices for hydrogen peroxide and DRAM memory chips. In doing this, both courts side-stepped the requirement in the aggregate damages provisions that liability must be proved before damages can be assessed in the aggregate. A close examination of the decisions suggests, however, that the courts have in effect done away with this statutory requirement.

The DRAM Class Action

DRAM chips are a kind of memory chip used in computers, automobiles, mobile phones, GPS units, cameras, and other consumer electronic products.

Between September 2004 and January 2007, several manufactures of DRAM chips pled guilty in the United States to fixing prices for DRAM chips from 1999-2002. The U.S. Department of Justice has collected \$731 million in fines to date. Some manufacturers have also settled direct purchaser class actions in the U.S., paying about \$160 million. To date there have been no convictions or settlements in Canada against manufacturers of DRAM chips.

The *Pro-Sys* class action alleged a price-fixing conspiracy contrary to the *Competition Act*, as well as common law conspiracy, interference with economic interests, unjust enrichment, waiver of tort, and constructive trust. It proposed a class consisting of all purchasers of DRAM chips or products containing DRAM chips from 1999-2002. The proposed class in theory included both direct and indirect purchasers, but the plaintiffs admitted that indirect purchasers predominated. The representative plaintiff, Pro-Sys Consultants Ltd., was an indirect purchaser: it bought a Toshiba laptop in 2002.

In a decision issued in 2008, Justice Masuhara of the the British Columbia Supreme Court held that the proposed class action would degenerate into a series of individual trials.⁵ Key issues, including whether the plaintiffs paid more because of price-fixing by manufacturers of the chips, could not be determined on a class-wide basis, he held. He considered that an aggregate

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assessment of damages, as proposed by the plaintiffs, would not solve this problem, as this procedure is only available after liability has been established.

As a result, Masuhara J. held, a class proceeding was not the preferable procedure when evaluated against the goals of class proceedings legislation. First, it would not promote judicial economy, since liability would have to be established on an individual basis, with the result that the individual issues would overwhelm the common ones. Second, behaviour modification can be achieved through government enforcement, as well as settlements with direct purchasers in the United States. Third, the proposed *cy-près* distribution of damages indicated that access to justice was not increased by this proposed class action.

Masuhara J. also held that because the proposed class included both direct and indirect purchasers at different levels of the distribution chain, there were irreconcilable conflicts within the proposed class.

Turning to the plaintiffs' waiver of tort claim, Masuhara J. held that the gain that the plaintiffs sought to recover must be referable to the class members; that is, there must be a causal connection between the gain and the wrongful conduct. He determined that this could not be established on a class-wide basis.

The plaintiffs appealed. Before the appeal court's decision was released, the Ontario Superior Court of Justice released its decision certifying the hydrogen peroxide class action.

The Hydrogen Peroxide Class Action

In June 2006, Irving Paper Ltd. and a number of others started a proposed class action in Ontario on behalf of direct and indirect purchasers, against a number of producers and distributors of hydrogen peroxide (H_2O_2) and of its "downstream products", sodium perborate and sodium percarbonate,⁶ alleging that they conspired to fix prices, allocate markets, and fix production of hydrogen peroxide and its downstream products from 1994 to 2005.

Hydrogen peroxide is a bleaching agent used in many industries. The Canadian pulp and paper industry is by far the largest user of hydrogen peroxide in Canada.

The alleged conspiracy has been the subject of criminal enforcement action in Europe, the U.S., and Canada. In 2006, the EU announced fines totalling €388 million and other measures against nine producers of hydrogen peroxide. In the U.S., two defendants have pleaded guilty to price-fixing charges. In Canada, so far only Akzo Nobel has pleaded guilty and been fined \$3.15 million for fixing the price of hydrogen peroxide from 1998 to 2001. The Bureau's investigation is still ongoing, however.

A U.S. class action on behalf of direct purchasers was certified in January 2007, and settlements were reached with two defendants in early 2009.

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In Canada, after reaching settlements with three sets of defendants, in exchange for their cooperation against the non-settling defendants, the plaintiffs sought certification of the action as a class proceeding.

The Hydrogen Peroxide Certification Decision

The defendants used the strategy in opposing certification that has become standard since *Chadha v. Bayer*:⁷ they pointed to the complexity of the distribution chain for hydrogen peroxide. They pointed out that the proposed class, including all direct and indirect purchasers of hydrogen peroxide over 11 years, could include all residents of Canada. Hydrogen peroxide and the downstream chemicals have very different applications and end users, including pulp and paper, cosmetics, laundry detergent, rocket fuel and electronics. Each of these uses and their distribution channels have different pricing. The defendants thus argued that harm or damages could not be established on a class-wide basis. They also pointed to the “pass-on” problem, that is, the difficulty of establishing whether each participant in the distribution chain passed on the price increase, and to what extent.

Madam Justice Rady rejected these concerns. Her reasoning turned on the question of whether it is necessary to show that every member of the class suffered damages, and whether an aggregate assessment of damages is available.

Rady J. held that there was an identifiable class, and that sheer size was not a reason to let a party get away with “bad behaviour”. She added that it is not necessary to establish that each member of the class suffered damages,⁸ relying on Justice Rosenberg’s statement in *Markson v. MBNA Canada Bank* that “The only serious issue is how many members of the class actually suffered an economic loss”.⁹ It should be noted, however, that Rosenberg J.A. was addressing the pass-on issue in making this statement.

Turning to the question of whether there were common issues, Rady J. held that issues relating to the existence and scope of the conspiracy could be determined without any reference to individual class members and that this would significantly advance the litigation.

The real question, Rady J. noted, was whether the fact of harm and aggregate damages were appropriate common issues, and, “At the heart of the debate is whether the decision in *Chadha* has been overtaken by the recent Court of Appeal decisions in *Markson* and *Cassano [v. Toronto Dominion Bank]*”.¹⁰

Rady J. held that these decisions apply to all cases, not just breach of contract cases, and did change the law, in two important ways. First, only “potential liability” needs to be established before resort can be had to the aggregate damages provisions of the CPA. Second, it is not necessary to establish that every class member suffered a loss:

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I am of the view that *Markson* and *Cassano* signal a different approach to be taken to certification whether it be in breach of contract or other types of cases. Justice Rosenberg spoke of the need to establish “potential liability” before resort to the aggregation provisions could be had. That being so, it seems to me that the plaintiffs here need only prove potential liability -- in other words, that the defendants acted unlawfully. This would trigger the aggregate assessment provisions. Further, *Markson* establishes that not every class member need have suffered a loss and so it is not necessary to show damages on a class-wide basis.¹¹

With that basis, Rady J. turned to an examination of the expert evidence on proof of damages. She first cautioned that it is not necessary to reconcile conflicting expert opinions at the certification stage. The test is whether there is “some basis in fact, for the certification requirement at issue”.¹²

The plaintiffs’ expert, Dr. John Beyer, an economist with 30 years’ experience studying the pulp and paper industry, opined that the alleged price fixing conspiracy “would have had a common impact across direct purchaser members of the proposed class”, and that it would have “impacted some indirect purchasers”. He proposed determining aggregate damages by estimating a “but for” price using multiple regression analysis to control for factors other than the conspiracy. He considered that aggregate damages could be estimated using the defendants’ transaction and cost data, plus publicly available data and data from non-defendants. He also opined that the pass through of the overcharge could be calculated for pulp and paper and water treatment markets, which account for over 92% of hydrogen peroxide consumption.¹³

The defendants’ expert, Dr. Richard Schwindt, attacked Dr. Beyer’s analysis on a number of grounds. He opined that Dr. Beyer had not accounted for the fact that hydrogen peroxide may be bundled with transportation, technical services, and equipment; that there are substitutes available in some cases; that price announcements bore no connection with actual prices; and that, in fact, Dr. Beyer had failed to propose a method to determine the actual price of hydrogen peroxide.¹⁴

So far as pass-through is concerned, both economists agreed that some products “possess market characteristics that would enable suppliers to pass-through” price increases.¹⁵ But Dr. Schwindt disagreed with Dr. Beyer’s contention that Canadian pulp and paper mills would have been unable to pass-through price increases in their sales to the U.S. because they were price-takers in a market whose pricing was determined by U.S. pulp and paper mills. First, he said, if Dr. Beyer was correct in assuming that the conspiracy operated on both sides of the border (an assumption supported by criminal convictions and class action settlements in the U.S.!), then U.S. pulp and paper mills also faced higher hydrogen peroxide prices and had an incentive to pass on the

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overcharge. Second, he noted that many Canadian mills are owned by U.S. multinationals, and that in some markets, Canadian mills are dominant.

Resolving conflicts between the experts is for the trial judge, Rady J. cautioned; she “need only be satisfied that a methodology may exist for the calculation of damages”. She added:

Dr. Beyers’ report attempts to postulate such a methodology. Whether his evidence will be accepted at trial is a completely different issue. It may well be that Dr. Schwindt’s various criticisms are well-founded. However, at this stage of the proceedings and on the strength of the evidentiary record as it exists today, I simply am unable to say that Dr. Beyer’s opinion will not be accepted by a court. I am also mindful that the parties have not yet had documentary or oral discovery and I think it quite likely that material produced by both the settling and non-settling defendants will be significantly important to the experts in refining their analysis of damages. It is simply not possible at this stage of the proceeding to determine whose opinion is to be preferred.¹⁶

So far as pass-through is concerned, Rady J. adverted to the possibility that passing on is not a defence, noting that the Supreme Court has commented adversely on the passing on defence in two cases, albeit that they were not price fixing cases.¹⁷

Next, Rady J. considered whether a class proceeding was the preferable procedure, and concluded that it was. She noted that the defendants had not identified an alternate procedure other than no litigation.

Rady J. then held that certification as a class proceeding would promote the goal of behaviour modification by discouraging price fixing and making the defendants account for the economic harm they caused. It would promote access to justice, she held, because it is unlikely that individual indirect purchasers would sue to recover their very small losses. Rady J. also considered that judicial economy would be promoted by certification, given that whether there was a conspiracy and the aggregate amount of damages were both common issues.¹⁸

Finally, Rady J. accepted that there may be a conflict between direct and indirect purchasers, but rejected the defendants’ contention that that this would prevent the plaintiffs from acting in a representative capacity. Although Rady J. did not advert to it, it is noteworthy that the representative plaintiffs include direct purchasers (Irving Paper) and indirect purchasers, both corporate (Distributech Inc.) and individual (Stacey Leavitt).

The defendants have sought leave to appeal from the Divisional Court.¹⁹ The leave application has been argued, but the decision had not yet been handed down at the time of writing.

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The DRAM Appeal Decision

The BC Court of Appeal handed down its decision in the DRAM case in November 2009, shortly after Rady J.'s decision in hydrogen peroxide. The court certified the action as a class proceeding, holding that the motion judge erred in concluding that damages could not be determined as a common issue using the aggregate damages provisions of British Columbia's *Class Proceedings Act*.²⁰

Writing for the court, Mr. Justice Smith focussed on the unjust enrichment claim. He relied on the conclusion of the Ontario Court of Appeal decision in *Serhan v. Johnson & Johnson*²¹ that under the doctrine of waiver of tort, it is possible that liability for unjust enrichment may be established on proof of wrongful conduct and resulting gain, and without proof of loss by the plaintiff.²²

Smith J.A. then suggested that guilty pleas in the United States might prove that the defendants benefited from the conspiracy pleaded in the Canadian class actions. U.S. law provides for maximum fines of twice the pecuniary gain to the conspirators or twice the loss to the victim and the defendants agreed in their plea agreements that had the charges been tried, the loss or gain would have been sufficient to justify the agreed fine. Thus, Smith J.A. reasoned, the guilty pleas by the defendants in the U.S. amount to admissions of wrongful conduct and a benefit therefrom. This, he concluded, would establish liability in the restitutionary actions.²³

Smith J.A. also accepted the plaintiffs' approach of proving causation on a class-wide basis by using statistical evidence and economic theory to establish "but for" prices, thereby demonstrating the benefit received by the conspirators. He found support for this approach in the decision of the BC Supreme Court in *Knight v. Imperial Tobacco Canada Ltd.*,²⁴ a case seeking damages under BC's consumer protection legislation from cigarette manufacturers alleging that advertising for light and mild cigarettes was deceptive because it conveyed the misleading impression that those cigarettes were less harmful than regular cigarettes. The plaintiffs in that action claimed that fair market value of the cigarettes would have been different (lower) but for the deceptive advertising. Thus all class members paid too much for the cigarettes, and this overpayment established the necessary causal link between the deception and the damage. The BC Supreme Court accepted that:

The benefit to the defendant is measured by the sales of the product in British Columbia to the end user, the consumer, and individual facts. The actual use made of the product by each individual consumer has no bearing on the plaintiff's claim that the defendant manipulated the market by falsely creating a value for the product that exceeded its true value.²⁵

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Smith J.A. interpreted *Knight* as standing for the proposition that a finding of liability is not necessary before the aggregate damages provision can be used, and that, in fact, aggregate damages can be used to establish liability:

In my view, the chambers judge misapprehended the decision in *Knight*. In *Knight*, this Court affirmed the certification of an aggregate monetary award under the CPA as a common issue in a claim for disgorgement of the benefits of the defendants' wrongful conduct without an antecedent liability finding – rather, the aggregate assessment would establish concurrently both that the defendant benefited from its wrongful conduct and the extent of the benefit.²⁶

Smith J.A. then considered the three statutory preconditions to be satisfied before statistics can be used to determine aggregate damages.²⁷ The first, a claim for monetary relief, was obviously satisfied. The second, that “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” was satisfied by guilty pleas in the U.S., Smith J.A. held:

As I have explained, the admissions inherent in the guilty pleas and the plea agreements in the U.S. criminal proceedings, if proven, would establish liability in the restitutionary claims, leaving nothing to be determined except the assessment of the amount of the respondents' gain attributable to this particular class, if any, and its distribution. Accordingly, the second precondition is satisfied.²⁸

The third requirement is whether aggregate damages can reasonably be determined without proof by individual class members, that is, based on common evidence. Here, Smith J.A. held, the motion judge set the bar too high in assessing the merits of the economic evidence and concluding that the plaintiffs had not put forth a workable class-wide methodology for assessing damages. Rather, Smith J.A. emphasized, the plaintiff need only show “some basis in fact” for each certification requirement,²⁹ and should not attempt to resolve conflicts in the expert evidence.³⁰

Thus, he concluded, the plaintiffs were required only to show a “credible or plausible methodology”. Three facts led Smith J.A. to the conclusion that they had: first, it was common ground that statistical regression analysis is in theory capable of estimating gain and pass-through in price-fixing cases. Second, the defence expert had conceded that aggregate harm had been estimated by two experts in the U.S. litigation. Third, the U.S. plea agreements suggested that the Department of Justice was prepared to provide that the “agreed fines were justified as representing twice the gross gain or the gross loss”.³¹

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Smith J.A. concluded:

As a result, since the gain obtained by the respondents will be the mirror image of the total loss suffered by the class, any legal objection to the use of the aggregation provisions of the CPA to assess aggregate damages in the conspiracy actions at common law and pursuant to the *Competition Act* would be of no practical importance. The common issues trial will have determined the respondents' wrongful conduct as common issues and, as a practical matter, will have determined the aggregate amount of the loss suffered by the class. It would then be open to the trial judge to distribute the award either by assessing loss on an individual basis, on an average or proportional basis pursuant to s. 32 of the CPA, or on a *cy-près* basis pursuant to s. 34(1), [...] In any case, the participation of the respondents would not be required beyond the common issues trial.³²

Having determined that damages could be assessed as a common issue, Smith J.A. easily determined that a class action was the preferable procedure.

Smith J.A. expressly disagreed with Masuhara J.'s comment that the plaintiffs' reference to using a *cy-près* distribution indicated that the goal of securing access to justice was not important in this case. Smith J.A. considered it premature to conclude that a *cy-près* distribution would be used.³³

Smith J.A. also disagreed with Masuhara J.'s conclusion that the proposed representative plaintiff was in a conflict of interest with other class members at different levels in the distribution chain. He considered it a "minor issue that may never be reached", holding that the representative plaintiff shares with other class members an interest in proving the conspiracy and the resulting gain.³⁴

The BC Court of Appeal thus certified the action as a class proceeding. There is, however, some confusion over the extent of certification. The plaintiffs say that the Court certified the action on the basis of both the restitutionary and compensatory (*Competition Act* and tort) claims. The defendants say that based on the Court's reasoning, certification is limited to the restitutionary claims only. The parties have argued this issue, but the order has not yet been settled. In the meantime, the defendants have sought leave to appeal to the Supreme Court.

Can Aggregate Assessment of Damages Be Used to Establish Liability?

Both *Irving Paper* and *Pro-Sys* raise the question: are the aggregate damages provisions of the CPA only available once liability is established or, on the contrary, can they be used to establish damages as a component of a finding of liability?

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The aggregate damages provisions in the Ontario and BC versions of the CPA are practically identical. Both statutes set out the following three preconditions for resort to aggregate damages, in identical wording:

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) 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; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.³⁵

The first of the three preconditions is established by looking at the pleadings, and will obviously be met in any case where damages are sought. It is interesting to note, however, that if an aggregate award of damages is distributed *cy-près* then although monetary relief may initially have been claimed on behalf of class members, it is not ultimately awarded to them!

It is the second precondition that raises the question at issue in *Irving Paper* and *Pro-Sys*. The wording of the provision suggests that aggregate damages assessment is not available until liability is established. The trouble is that many causes of action require proof of loss as one of the elements of the cause of action itself. Such causes of action include the statutory cause of action for conspiracy (and other criminal offences) under section 36 of the *Competition Act*, the tort of conspiracy, unjust enrichment, as well as perhaps the most commonly pleaded cause of action of all, negligence. If the aggregate damages provisions require that liability be proven before they can be used, then when these causes of action are pleaded, the fact of loss, albeit not its extent, must be proven for every member of the class before the quantum of damages can be assessed on an aggregate basis. This, in turn, makes it more difficult (though not impossible) to certify an action relying on those causes of action.

The decisions in *Irving Paper* and *Pro-Sys* attempt to side-step the second precondition in two different ways. When these attempts are examined closely, however, it becomes apparent that both cases have simply done away with the second precondition altogether.

The Expansion of the “Potential Liability” Question

In *Irving Paper*, Rady J. relied on, and expanded, the concept of “potential liability”. This concept, elaborated by the Ontario Court of Appeal in *Markson*, is difficult to square with the requirements of section 24 itself without considering the context of *Markson*. The plaintiffs in *Markson* pleaded

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the case in breach of contract and unjust enrichment, and sought declaratory and injunctive relief as well as damages and restitution. No proof of loss is required to establish liability for breach of contract. Thus the way is clear to resort to an aggregate assessment of damages. While proof of loss (corresponding deprivation) is required to establish a claim for unjust enrichment, a finding that the interest rate charged to some customers exceeded the maximum legal rate would entitle the class to declaratory and injunctive relief, the court concluded. Indeed, the Court of Appeal expressly held that “The statistical sampling authorized by s. 23 cannot be used to determine the defendant’s liability”, and expressly confirmed its earlier holding in *Chadha* that “s. 24 ‘is applicable only once liability has been established, and provides a method to assess the quantum of damages on a global basis, but not the fact of damage’”.³⁶

That being said, if adding a claim for injunctive or declaratory relief were sufficient to avoid the force of the second precondition in cases where the underlying cause of action requires proof of loss, then the second precondition would be no bar at all.

Cassano was a clearer case, as the Court of Appeal itself recognized. The plaintiffs claimed that TD Bank breached its contract with holders of Visa cards by charging undisclosed and unauthorized fees on foreign currency transactions. The Court of Appeal held that determination of the issue of whether there was a breach of contract would determine the issue of liability, leaving only the quantum to be assessed. A finding that TD Bank had breached its contract in charging the fees at issue would mean that all such fees were improper and TD would be liable.³⁷

Rady J.’s conclusion that *Markson* and *Cassano* have overtaken *Chadha* is thus at odds with the Court of Appeal’s express statement in *Markson* and the facts of *Cassano*. Rady J. appears to have expanded the concept of “potential liability” to mean “proof of all of the elements of the cause of action except for proof of loss”. While this gets around the difficulty created by the second precondition, it is inconsistent with the statutory language.

Restitutionary Claims to the Rescue

The BC Court of Appeal avoided the problem by resorting to the theory in *Serhan* that a claim for restitution based on waiver of tort may not require proof of any underlying tort, and thus, may not require proof of loss.³⁸ Proof of gain to the defendant is still required, but it may be possible to obtain this from the guilty pleas in the U.S., Smith J.A. reasoned.³⁹ This is problematic, as discussed below.

Smith J.A. went further still, holding that an aggregate assessment using statistical evidence could be used to prove both liability and the gain or damages (they are the same thing in this reasoning), without an antecedent liability finding.⁴⁰ In other words, he held that the aggregate assessment of damages can itself be used to satisfy the second precondition to aggregate assessment of damages! This completely wipes out the second precondition.

What Do U.S. Guilty Pleas Prove?

The Court of Appeal's reliance on U.S. guilty pleas in DRAM to establish the gain to the defendants is highly problematic for a number of reasons.

The Court's reasoning suggests that criminal proceedings in a foreign jurisdiction can give rise to some form of *res judicata* or issue estoppel in civil proceedings in Canada. This goes beyond the normal bounds of those doctrines.

Even supposing that the U.S. guilty pleas are admissible against the defendants in Canadian proceedings, the question must be asked: what do they prove? The plea agreements have several important internal limitations. They refer to a conspiracy to fix prices in the U.S. "and elsewhere". There is no reference to Canada. They stipulate that the conspiracy applied to prices charged to certain original equipment manufacturers in the U.S., namely the Hewlett-Packard Company, Compaq Computer Corporation, International Business Machines Corporation, Apple Computer Inc., and Gateway, Inc, and provide the size of this market in the U.S. The plea agreements are silent about other distribution channels for DRAM, and thus are of no probative value for those channels. They are also silent as to markets outside of the U.S.

It is true, as Smith J.A. noted, that the U.S. plea agreements stipulate that the agreed fine amount is less than the maximum fine of twice the gain or loss caused by the conspiracy. In practice, under U.S. Sentencing Guidelines, however, that is not how fines are determined. In the case of Samsung, at least, the fine was determined based on a base fine of 20% of the volume of affected commerce, with multipliers based on a culpability score.⁴¹

In sum, the plea agreements contain nothing that would constitute proof that the defendants achieved any gain resulting from sales, whether direct or indirect, into Canada. They do not even contain sufficient information to evaluate the gain or loss in the U.S. They also do not provide evidence of any conspiracy apart from that affecting the named OEMs operating in the U.S. Perhaps most fundamentally, because there is nothing in the plea agreements to support a conclusion either that the defendants conspired in Canada, or that effects of the conspiracy were felt in Canada, they provide at best minimal support to an allegation that an offence was committed under the *Competition Act*. A pass-on analysis must be completed in order to demonstrate that Canadian purchasers suffered a loss as a result of the conspiracy and thus found an allegation that an offence was committed in Canada.⁴²

Moreover, it would seem that on Smith J.A.'s analysis, the representative plaintiff could not recover on a restitutionary basis. Smith J.A. accepted that the gain attributable to the class must be assessed.⁴³ However, the representative plaintiff bought its laptop from *Toshiba*, which was not one of the OEMs identified as a victim of the conspiracy in the U.S. plea agreements. Based on the U.S. plea agreements – on which Smith J.A. relied to support certification – there is no gain that could possibly be attributed to the representative plaintiff! While the representative

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plaintiff may have pleaded causes of action in conspiracy and waiver of tort, the basis on which liability will be determined precludes the representative plaintiff recovering.⁴⁴

Finally, Smith J.A. said that all defendants except one had pleaded guilty in the U.S. That is not true. Infineon Technologies AG did plead guilty, but Infineon Technologies North America Corp. did not. Hynix Semiconductor Inc. pleaded guilty, but Hynix Semiconductor America Inc. and Hynix Semiconductor Manufacturing America Inc. did not. Samsung Semiconductor, Inc. and Samsung Electronics America, Inc. pleaded guilty, but Samsung Electronics Canada Inc. did not. The fact that the defendants who did not plead guilty may be affiliates of those who did does not make them liable to disgorge an unlawful gain received by their affiliates.

Reasoning from Waiver of Tort Back to the Tort

If the plaintiffs are correct in their argument that the BC Court of Appeal has also certified the compensatory claims, then it would seem that the Court has assumed that proof of liability for restitution based on proof of gain without corresponding loss also proves liability for conspiracy under the *Competition Act* and at common law. After finding that the plaintiffs had shown a credible or plausible methodology for determining the total (or aggregate) gain or loss using statistical methods, Smith J.A. wrote:

As a result, since the gain obtained by the respondents will be the mirror image of the total loss suffered by the class, any legal objection to the use of the aggregation provisions of the CPA to assess aggregate damages in the conspiracy actions at common law and pursuant to the Competition Act would be of no practical importance. The common issues trial will have determined the respondents' wrongful conduct as common issues and, as a practical matter, will have determined the aggregate amount of the loss suffered by the class. It would then be open to the trial judge to distribute the award either by assessing loss on an individual basis, on an average or proportional basis pursuant to s. 32 of the CPA, or on a *cy-près* basis.

In other words, once again an aggregate assessment of damages is used to determine liability, thereby meeting the second precondition and allowing the aggregate assessment of damages. It would appear, therefore, that the second precondition, which is inconsistent with this circularity, is “of no practical importance”.

Recovery Without Establishing a Cause of Action

In a traditional law suit (that is, non-class proceeding), in order to recover damages, the plaintiff must establish all of the elements of the cause of action pleaded. In the case of an action for conspiracy under section 36 of the *Competition Act* and at common law, one of the elements that

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must be established is loss to the defendant. Both section 36, and the decision of the Supreme Court of Canada in *Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*⁴⁵ expressly require proof of loss as one of the elements of the cause of action. If the defendant cannot establish a loss, then the defendant loses.

It is trite law that the *Class Proceedings Act* is strictly procedural and does not change substantive law or create new causes of action.⁴⁶ Nevertheless, the decisions in *Irving Paper* and *Pro-Sys* create the possibility that in class proceedings the class may recover damages without the necessity of proving the cause of action that is said to give rise to those damages.

In *Irving Paper*, Rady J. expressly did away with the fundamental requirement that the plaintiff establish all of the elements of the cause of action. She stated:

Markson establishes that not every class member need have suffered a loss and so it is not necessary to show damages on a class-wide basis.⁴⁷

Because *Markson* involved claims for breach of contract, it was not necessary in that case for every class member to have suffered a loss. In the context of an action framed in conspiracy, however, Rady J.'s statement amounts to a repudiation of loss as an element of the cause of action when the action is structured as a class proceeding. This clearly violates the principle that the CPA does not change the substantive law.

At the moment it is not clear whether the BC Court of Appeal went as far as Rady J. However, if the plaintiffs' interpretation of the reasons is correct, then it would seem that the Court has admitted the possibility of finding liability to a class that may include members who did not suffer any loss, and thus have no cause of action.

Recovery by Whom?

The final question raised by these cases is: recovery by whom? Smith J.A. expressly repudiated Masuhara J.'s comment that the suggestion by the plaintiffs that the damages might be distributed *cy-près* meant that the goal of securing access to justice was not met by the proposed class action.

However, in both cases, an aggregate assessment of damages makes *cy-près* distribution all but unavoidable. Creating a scheme to identify and distribute small amounts to individual consumers would be prohibitively expensive. It is this problem that has made price fixing class actions hard to certify. Every price fixing class action settlement reviewed by the author has used *cy-près* distribution to an assortment of worthy recipients such as universities and consumer groups.

The combination of aggregate assessment of damages, without inquiring as to whether each class member has suffered a loss, and *cy-près* distribution, means that firms found to have fixed

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prices are forced to disgorge a statistically-determined measure of gain, not to the people who might (but might not) have been overcharged, but to third parties who almost certainly were not overcharged. In effect, aggregate assessment of damages plus *cy-près* distribution turns what was intended to be a compensatory scheme into a civil fine.

Notes

¹ [2009] O.J. No. 4021 (S.C.J.).

² 2009 BCCA 503.

³ Michael Osborne, a partner of Affleck Greene McMurtry LLP, practises competition law and commercial litigation.

⁴ *Class Proceedings Act*, S.O. 1992, c. 6, s. 24; *Class Proceedings Act*, RSBC 1996, c. 50, s. 29.

⁵ *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2008 BCSC 575.

⁶ Sodium perborate (NaBO₃) is formed by the reaction of hydrogen peroxide with two other chemicals, and sodium percarbonate (Na₂CO₃•1.5H₂O₂) is formed by the adduction of sodium perborate and hydrogen peroxide. Both are used in household bleaches.

⁷ (2003), 63 O.R. (3d) 22 (C.A.).

⁸ *Irving Paper* at ¶105.

⁹ 2007 ONCA 334 at ¶55.

¹⁰ 2007 ONCA 781.

¹¹ *Irving Paper* at ¶118.

¹² *Hague v. Liberty Mutual Insurance Co.*, [2004] O.J. No. 3057 (S.C.J.), quoted at *Irving Paper*, ¶119.

¹³ *Irving Paper* at ¶122-127.

¹⁴ *Irving Paper* at ¶128-131.

¹⁵ *Irving Paper* at ¶136.

¹⁶ *Irving Paper* at ¶143.

¹⁷ The cases are: *British Columbia v. Canadian Forest Products Limited*, [2004] 2 S.C.R. 74 and *King Street Investments Limited v. New Brunswick (Minister of Finance)*, [2007] S.C.R. No. 3. For a discussion of these cases, see M. Osborne, "Passing-on no defence; unlawfully collected taxes must be refunded, Supreme Court rules", *The Litigator*, Jan. 2007, available at <http://www.thelitigator.ca/index.php/2007/01/10/passing-on-no-defence-unlawfully-collected-taxes-must-be-refunded-supreme-court-rules/>.

¹⁸ *Irving Paper*, ¶153-156.

¹⁹ In Ontario, appeals from interlocutory orders, including orders certifying a class, are to a branch of the Superior Court called the Divisional Court.

²⁰ Section 29.

²¹ [2009] O.J. No. 402 (Div. Ct.). For a discussion of this case, see M. Osborne, "Restitution or windfall? Court certifies class action for consumers who suffered no damages", *The Litigator*, Nov. 2006, <http://www.thelitigator.ca/index.php/2006/11/11/restitution-or-windfall/>.

²² It should be emphasized that *Serhan* does not say that proof of loss is not required; rather, it refuses to rule out the possibility at the pleadings stage.

²³ *Pro-Sys*, BCCA, ¶33.

²⁴ 2005 BCSC 172, varied, 2006 BCCA 235.

²⁵ *Knight*, BCSC, ¶42.

²⁶ *Pro-Sys*, BCCA, ¶39.

²⁷ BC CPA s. 29(1); Ont. CPA s. 24(1).

²⁸ *Pro-Sys*, BCCA, ¶44.

Comment

²⁹ Following *Hollick v. Toronto (City)*, 2001 SCC 68 at ¶15

³⁰ Citing *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at ¶50, and *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.) at ¶76.

³¹ *Pro-Sys*, BCCA, ¶68.

³² *Pro-Sys*, BCCA, ¶70.

³³ *Pro-Sys*, BCCA, ¶74.

³⁴ *Pro-Sys*, BCCA, ¶78.

³⁵ Ont. CPA s. 24; BC CPA s. 29.

³⁶ *Markson*, ONCA, at ¶40.

³⁷ *Cassano*, ONCA, at ¶42, 47.

³⁸ *Pro-Sys*, BCCA, at ¶30-31.

³⁹ *Pro-Sys*, BCCA, at ¶33.

⁴⁰ *Pro-Sys*, BCCA, at ¶39.

⁴¹ See *US v. Samsung, Joint Sentencing Memorandum*, November 30, 2005, available at <http://www.justice.gov/atr/cases/f213400/213416.htm>. The joint sentencing memoranda for the other DRAM producers that pleaded guilty were not published on the DOJ website.

⁴² Assuming, that is, that effects in Canada resulting from a foreign conspiracy will support a conviction under section 45. This issue has yet to be determined.

⁴³ *Pro-Sys*, BCCA, ¶44.

⁴⁴ In Ontario, the plaintiff must have a cause of action against at least one of the defendants, and for each defendant, there must be a representative plaintiff with a cause of action against that defendant. In *Ragoonanan v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.) per Cumming J. at ¶50, "It is axiomatic that the representative plaintiff must have a cause of action against a defendant in the action. A 'plaintiff' is, by definition, someone who brings an action against a defendant because of an asserted cause of action against the defendant." However, in BC the rule is different. In *MacKinnon v. National Money Mart Co.*, 2004 BCCA 274, the court held that "while the Act requires a cause of action against each named defendant, that cause of action must be held by class members, not necessarily the representative plaintiff" The court relied on BC's CPA s. 2(4), which allows the court to appoint as a representative plaintiff a person who is not a member of the class. the Ontario CPA does not contain such a provision.

⁴⁵ [1983] 1 S.C.R. 452.

⁴⁶ This principle has been stated many times, beginning with *Abdool v. Anaheim Management Ltd.* (1993), 15 O.R. (3d) 39 (Gen. Div.) in Ontario and *Harrington v. Dow Corning Corp.* (1997), 29 B.C.L.R. (3d) 88 (S.C.) in BC.

⁴⁷ *Irving Paper* at ¶118.