

**CITATION:** Quinn v. Samsung Electronics Co. et al, 2011 ONSC 7557  
**COURT FILE NO.:** 54053 CP  
**DATE:** 2011-12-19

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** JOSEPH QUINN and MICHAEL HARRIS (Plaintiffs) – and – SAMSUNG ELECTRONICS CO., LTD., SAMSUNG SEMICONDUCTOR INC., SAMSUNG ELECTRONICS CANADA INC., HITACHI AMERICA LTD., HITACHI LTD., HITACHI CANADA LTD., HYNIX SEMICONDUCTOR INC., HYNIX SEMICONDUCTOR AMERICA INC., MICRON SEMICONDUCTOR PRODUCTS INC., MICRON TECHNOLOGY INC., MICRON SEMICONDUCTOR CANADA, MITSUBISHI ELECTRIC AND ELECTRONICS U.S.A. INC., MITSUBISHI ELECTRIC CORPORATION MITSUBISHI ELECTRIC SALES CANADA INC., RENESAS TECHNOLOGY AMERICA INC., RENESAS TECHNOLOGY CORPORATION, RENESAS TECHNOLOGY CANADA LIMITED, TOSHIBA AMERICA CORPORATION, TOSHIBA AMERICA ELECTRONICS COMPONENTS INC., TOSHIBA CORPORATION, TOSHIBA OF CANADA LIMITED and WINBOND ELECTRONICS CORPORATION AMERICA INC. (Defendants)

**BEFORE:** JUSTICE L.C. LEITCH

**COUNSEL:** Heather Rumble Peterson, for the Plaintiffs

Charles M. Wright, for the plaintiffs

David Foulds and Susan Friedman, for the Mitsubishi, Renesas and Hitachi Defendants

Warren B. Milman, for the Hynix Defendants

David Kent, for the Micron Defendants

Robert E. Kwinter, for the Samsung Defendants

Laura Cooper, for the Toshiba Defendants

Daniel G. Edmondstone, for the Defendant Winbond Electronics Corporation America

**HEARD:** December 1, 2011

Written submissions filed thereafter

**ENDORSEMENT**

[1] The plaintiffs move for an order approving the discontinuance of this action.

[2] Leave of the Court is required to discontinue this proceeding pursuant to s. 29 (1) of the *Class Proceedings Act*, 1992, S.O. 1992 c. 6.

[3] Section 29 (1) provides as follows:

A proceeding commenced under this act...may be discontinued or abandoned only with the approval of the Court on such terms as the Court considers appropriate.

[4] Pursuant to s. 29 (4), if a discontinuance is approved, the Court shall consider whether notice should be given under s. 19. Section 19 provides that a Court may order any party to give such notice as it considers necessary to protect the interest of any class member or party, or to ensure the fair conduct of the proceeding.

### **Background Facts**

[5] This action was commenced by a Statement of Claim issued May 2, 2007. The plaintiffs allege that the defendants participated in an unlawful conspiracy to fix prices of flash memory or products containing flash memory sold in Canada and worldwide. Class counsel describes this action as a national class action with related actions in British Columbia and Quebec.

[6] There are two ongoing related class actions respecting a different type of electronic memory (the "DRAM" and the "SRAM" actions). As outlined in the affidavit of Mr. Mogergerman, the British Columbia DRAM action has taken the lead but is currently "paused" pending motions to appeal to the Supreme Court of Canada in two unrelated class actions relating to price fixing.

### **The Reasons for Discontinuance**

[7] Mr. Mogergerman has deposed that extensive investigations have been conducted into the alleged price fixing of flash memory. In addition, class counsel has consulted with U.S. class counsel about the viability of this action. As outlined in Mr. Mogergerman's affidavit, criminal investigations in various jurisdictions have concluded without criminal charges and actions in the United States with respect to price fixing of flash memory have not succeeded. Mr. Mogergerman has deposed that class counsel have not identified any credible evidence of a price fixing conspiracy which directly or indirectly impacted Canada. As a result, class counsel have determined that this action ought not to be pursued.

[8] As Mr. Mogergerman outlined in his affidavit, because there is no credible evidence of a conspiracy and the law regarding whether indirect purchasers have a cause of action is currently uncertain, pursuing this action will be expensive and risky. This action may not be certified and, considering the size of the case and the resources it would require, there is a risk of an adverse cost award.

[9] The defendants have consented to the discontinuance of this action.

[10] Class counsel will absorb all legal fees and disbursements which have been incurred to date.

[11] The issue on a motion for leave to discontinue an action is whether the interest of the class will be prejudiced by such an order (See: *Durling v. Sunrise Propane Energy Group Inc.*, [2009] O.J. No. 5969 at para. 14 (S.C.)).

[12] I am satisfied that the interest of the class will not be prejudiced by the discontinuance of this action and that the putative class members need not be given notice of the dismissal.

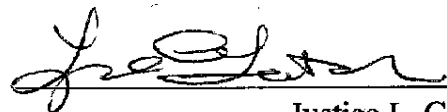
[13] This class action is "in its infancy." Approval for the discontinuance is being sought because the action "does not have an economically viable chance of success."

[14] An informational website has been maintained since January 31, 2008. As set out in the affidavit of Mr. Mogerman, there is no evidence that any class member relied in any manner on the pending class proceeding. In the supplementary affidavit of Ms. Woltz, it is clear that only two communications were received via the first communication system (one in 2009 and the other in 2010), and only one contact related to this action. No communications have been received subsequent to that time via the current communication system which has been in place since early 2011. No telephone calls have been received in response to the toll free telephone line referred to on the website. No press release or notice was ever released to the media and there has been no media coverage relating to this action based on the internet search conducted.

[15] The current content of the informational website reflects the fact that the plaintiff is seeking approval of the court to discontinue this action because extensive investigation has not identified any credible evidence of a price fixing conspiracy which directly or indirectly impacted Canada.

[16] I adopt the reasoning of Shaughnessy J. in *Chopik v. Mitsubishi Paper Mills Ltd.*, [2003] O.J. No. 192 (S.C.) and reach the same conclusion as he did at para. 20 in finding that notice does not need to be given to putative class members and that this "settlement resolves an issue relating to exposure to costs. It does not provide for any other payment to the proposed representative plaintiffs or class members. An order to give notice would require that the parties incur further financial expense with no corresponding benefit."

[17] For the above reasons, the plaintiffs are granted leave to discontinue this action on a without costs basis.



Justice L. C. Leitch

**Date:** December 19, 2011