CITATION: Fanshawe College v. LG Philips LCD Co. et al, 2011 ONSC 2484
COURT FILE NO.: 54054CP
DATE: 2011/05/26

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
THE FANSHAWE COLLEGE OF APPLIED ARTS AND TECHNOLOGY Plaintiff	Charles M. Wright, Andrea DeKay and Linda Visser for the Plaintiff
- and -	
LG PHILIPS LCD CO., LTD., L.G. PHILIPS LCD AMERICA, INC., SAMSUNG ELECTRONICS CO. LTD., SAMSUNG ELECTRONICS CANADA INC., HITACHI LTD., HITACHI DISPLAYS, LTD., HITACHI CANADA, LTD., HITACHI AMERICA LTD., HITACHI ELECTRONICS DEVICES (USA) INC., SHARP CORPORATION, SHARP ELECTRONICS CORPORATION, SHARP ELECTRONICS OF CANADA LTD., TOSHIBA CORPORATION, TOSHIBA MATSUSHITA DISPLAY TECHNOLOGY CO., LTD., TOSHIBA AMERICA CORPORATION, TOSHIBA OF CANADA LIMITED, AU OPTRONICS CORPORATION AMERICA, CHI MEI OPTOELECTRONICS USA, INC., CHI MEI OPTOELECTRONICS JAPAN CO., LTD. and CHUNGHWA PICTURE TUBES, LTD. Defendants	Katherine Kay and Eliot Kolers for Defendants LG Philips Robert E. Kwinter for the Defendants Samsung Donald S. Affleck, Q.C. and Michelle E. Booth for the Defendants Hitachi Ltd., et al Sylvie Rodrique and D. Michael Brown for the Defendants Sharp Corporation Laura Cooper for the Defendants Toshiba of Canada Limited et al Sandra A. Forbes and Jessica Norman for the Defendants Chi Mei Optoelectronics USA. Inc. et al
	HEARD: January 19, 20, 21, 24, 25 & 26, 2011

TAUSENDFREUND J.:

REASONS FOR JUDGMENT

Overview

[1] This is a motion to certify this action as a class proceeding.

[2] The plaintiff alleges that the defendants are liable for the torts of civil conspiracy and intentional interference with economic interests. They also assert that the defendants breached ss. 45 and 46(1) of the *Competition Act*, R.S.C. 1985, c. C-34 which entitles the plaintiff to damages pursuant to s. 36 of the Act.

[3] The defendants have not filed a statement of defence. They assert that the claims advanced in this action do not lend themselves to certification.

Background

[4] The action arises from an allegation of a global price-fixing conspiracy in the market for Thin Film Transistor Liquid Crystal Display ("TFT-LCD") Panels, commonly referred to in Canada as LCD Panels.

[5] Excerpts of the statement of claim allege:

> 1. The Plaintiffs claim on behalf of themselves and other persons in Canada who are similarly situated:
>
> (a) a declaration that the Defendants conspired each with the other to raise, maintain, fix and stablilize the price of large panel liquid crystal display ("LCD") (i.e. LCD panels that are 10 inches or larger, measured diagonally) and televisions, computer monitors and laptops containing LCD (collectively "LCD Products") during the period beginning at least January 1, 1998 to December 11, 2006 ("Conspiracy Period");
>
> (b) general damages for conspiracy, intentional interference with economic interests, and conduct that is contrary to Part VI of the *Competition Act*, R.S.C. 1985, c. C-34 in the amount of $150,000,000.00;

(c) punitive and exemplary damages in the amount of $15,000,000.00;

...

NATURE OF THE ACTION

2. This action arises from a conspiracy to fix, raise, maintain, or stabilize prices of LCD Products sold in Canada and worldwide. During the Conspiracy Period, the Defendants and their senior executives participated in illegal and secretive meetings and made agreements relating to the prices, market share divisions and production levels for LCD Products.

3. LCD panels use liquid crystal to control the passage of light. An LCD panel is made of two glass sheets sandwiching a layer of liquid crystal. The front sheet is fitted with a colour filter and the back sheet has transistors fabricated on it. When voltage is applied to a transistor, the liquid crystal is bent, allowing light to pass through to form a pixel. The front glass sheet contains a colour filter that gives each pixel its own colour. The combination of these pixels in the different colours forms the image on the panel.

4. While LCD is used in a variety of products, such as televisions, computer monitors, laptops, mobile phones, personal digital assistants, and digital cameras, this claim relates only to large panel LCDs used in televisions, computer monitors and laptops.

THE REPRESENTATIVE PLAINTIFF

5. The plaintiff, The Fanshawe College of Applied Arts and Technology ("Fanshawe College") is a community college located in London, Ontario. Fanshawe Colleges [*sic*] was established as a college of applied arts and technology pursuant to O.Reg. 34.03.

6. During the Conspiracy Period, Fanshawe College purchased LCD Products for use in its classrooms, computer laboratories and administration.

THE DEFENDANTS

7. Various persons and/or firms involved in the manufacturing, marketing, selling and/or distribution of LCD Products to customers throughout Canada, not named as Defendants herein, including but not limited to

AU Optronics Corp., Chi Mei Optoelectronics Corporation, and HannStar Display Corporation ("HannStar"), may have participated as co-conspirators in the violation alleged herein and may have performed acts and made agreements in furtherance thereof.

[6] In the United States, eight companies, including five defendants, have pleaded guilty to conspiring to fix prices of LCD Panels sold in the United States and elsewhere. These companies have agreed to pay fines totaling US$892 million:

Company	**Amount of Fine (U.S. dollars)**	**Plea Period**	**Scope of Plea**
LG Display Co. Ltd. and LG Display America, Inc.	$400 million	September 21, 2001 to June 1, 2006	All LCD
Sharp Corp.	$120 million	April 1, 2001 to December 1, 2006	LCD sold to Dell for use in laptops and computer monitors
		September 1, 2005 to December 1, 2006	LCD sold to Apple for use in iPods
		Fall 2005 to mid-2006	LCD sold to Motorola for use in Razr mobile phones
Chunghwa Picture Tubes Ltd.	$65 million	September 14, 2001 to December 1, 2006	All LCD
Hitachi Display Ltd.	$31 million	April 1, 2001 to March 31, 2004	LCD sold to Dell for use in laptops
Epson Imaging Devices Corporation formerly known as Sanyo Epson Imaging Devices	$26 million	Fall 2005 to mid-2006	LCD sold to Motorola for use in Razr mobile phones
Chi Mei Optoelectronics	$220 million	September 14, 2001 to December 1, 2006	All LCD
HannStar Display Corporation	$30 million	September 14, 2001 to January 31, 2006	All LCD

[7] The plea agreement between the parties in *United States v. LG Display Co., Ltd. and LG Display America Inc.* includes this excerpt:

Factual Basis for Offense Charged

(a) For purposes of this Plea Agreement, the "relevant period" is that period from on or about September 21, 2001, to on or about June 1, 2006. During the relevant period, LG. Philips LCD Co., Ltd., a joint venture between LG Electronics and Philips Electronics, and a corporation organized and existing under the law of Korea, and LG.Philips LCD America, Inc., a corporation organized and existing under the laws of the State of California, sold TFT-LCD into various markets, including the U.S. Effective March 4, 2008, LG.Philips LCD Co., Ltd., changed its name to LG DISPLAY CO., LTD., and effective March 6, 2008, LG Philips LCD America, Inc. changed its name to LG DISPLAY AMERICA, INC., the named defendants in this Plea Agreement. LG DISPLAY CO., LTD. has its headquarters and principal place of business in Seoul, Korea, and LG DISPLAY AMERICA, INC. has its headquarters and principal place of business in San Jose, California. During the relevant period, the defendants were engaged in the sale of TFT-LCD in the United States and elsewhere, and employed 5,000 or more individuals.

(b) TFT-LCD are glass panels composed of an array of tiny pixels that are electronically manipulated in order to display images. TFT-LCD are manufactured in a broad range of sizes and specifications for use in televisions, notebook computers, desktop monitors, mobile devices and other applications.

(c) During the relevant period, the defendants, through their officers and employees, including high-level personnel of the defendants, participated in a conspiracy among major TFT-LCD producers, the primary purpose of which was to fix the price of TFT-LCD sold in the United States and elsewhere. In furtherance of the conspiracy, the defendants, through their officers and employees, engaged in discussions and attended meetings, including group meetings commonly referred to by the participants as "crystal meetings," with representatives of other major TFT-LCD producers. During these discussions and meetings, agreements were reached to fix the price of TFT-LCD to be sold in the United States and elsewhere.

(d) During the relevant period, TFT-LCD sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution of TFT-LCD, as well as payments for TFT-

> LCD, traveled in interstate and foreign commerce. The business activities of the defendants and their co-conspirators in connection with the production and sale of TFT-LCD that were the subjects of the conspiracy were within the flow of, and substantially affected, interstate and foreign trade and commerce.

[8] Class proceedings have also been commenced in the United States regarding alleged price fixing in the LCD market. Both of these direct and indirect purchaser consolidated actions were certified as class actions: *In re TFT-LCD (Flat Panel) Antitrust Litigation,* 267 F.R.D. 291 (N.D.Cal., 2010) and *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583 (N.D.Cal., 2010); leave to appeal denied No. 10-80088 (9th Cir 14 June 2010).

[9] In the U.S. direct purchaser action, the court certified a class which included persons who purchased LCD Panels or computer monitors, notebook computers or televisions containing LCD Panels. The U.S. indirect purchaser action was certified on behalf of indirect purchasers of LCD Panels or computer monitors, notebook computers or televisions containing LCD Panels.

[10] The court in the U.S. indirect purchaser action referenced these allegations made by the plaintiffs (*In Re TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583 (N.D.Cal., 2010)):

> **Background**
>
> **I. The TFT-LCD market**
>
> This multidistrict litigation stems from allegations of a global price-fixing conspiracy in the market for Thin Film Transistor Liquid Crystal Display ("TFT-LCD") panels. TFT-LCD panels are used in a number of products, including but not limited to computer monitors, notebook computers, and televisions. TFT-LCD panels are made by sandwiching liquid crystal compound between two pieces of glass called substrates. The resulting screen contains hundreds of thousands of electrically charged dots, called

pixels, which form an image. The panel is then combined with a backlight unit, a driver, and other equipment to create a "module" allowing the panel to operate and be integrated into a television, computer monitor, or other product.

TFT-LCD panels are sold in a variety of sizes, and vary across a number of technical dimensions. For example, larger panels used for televisions require high contrast ratios for vibrant colours and wider viewing angles, while smaller panels used in mobile phones require small size and low weight. TFT-LCD panels have no independent utility, but have value only as components of other products. When a TFT-LCD panel is incorporated into a finished product, the panel is not modified, and remains a discrete, physical object within the finished product. TFT-LCD panels are purchased by many different types and sizes of customers through different manufacturing and distribution channels. The parties dispute the complexity of the distribution chain, with defendants contending that it is multi-layered, complex and heterogeneous, and plaintiffs asserting that the distribution chain is relatively simple and not materially different from the distribution chains in other high-tech industries.

Between 1996 and 2006, defendants collectively dominated the market for TFT-LCD panels and products, and the top six companies (Samsung, LG, Chi Mei, AU Optronics, Sharp, and Chunghwa) currently control in excess of 80% of the TFT-LCD panel market. ... The TFT-LCD industry is also marked by a number of cross-licensing agreements, joint ventures, and other cooperative arrangements which plaintiffs allege facilitate collusion.

Although panel prices vary according to the finished product, the panel is usually a significant cost component in finished TFT-LCD products. ...

Plaintiffs allege that during the class period, defendants formed a cartel to interfere with the normal cycle of supply and demand for TFT-LCD panels. According to plaintiffs, defendants agreed on prices, agreed to limit production, and agreed to manipulate the supply of TFT-LCD panels and products so that prices remained artificially high. Plaintiffs allege that defendants executed their price-fixing scheme by participating in surreptitious group and bilateral meetings, as well as communicating with each other by telephone and e-mail.

Plaintiffs allege that some group meetings were formalized and known as "Crystal Meetings." These meetings were attended by employees at three levels of defendants' corporations, including "CEO" or "top" meetings,

> attended by Chief Executive Officers and/or Presidents; "commercial" or "operation" meetings, attended by management-level personnel; and working group meetings attended by lower-level sales and marketing personnel. Plaintiffs allege that at these "Crystal Meetings," as well as in other communications, participants discussed supply and demand and general market conditions for TFT-LCD Products; exchanged fabrication plant and production capacity information; reached agreements on target prices, floor prices, and price ranges for TFT-LCD panels and products; planning consistent public statements on anticipated supply and demand; and disciplined new market entrants and pressured them to abide by agreed-upon pricing and production. Plaintiffs have submitted considerable evidence in the form of detailed meeting reports, e-mails and memoranda documenting numerous meetings between various defendants at which defendants shared price information and agreed on pricing and production levels. ...
>
> **II. The Department of Justice Investigation**
>
> In about 2006, the Antitrust Division of the Department of Justice began investigating a number of the defendants' alleged participation in a global conspiracy to fix prices of TFT-LCD panels. The investigation is ongoing. To date, seven corporate defendants in this action have pled guilty to Sherman Act violations relating to suppressing and eliminating competition by fixing prices of TFT-LCD panels.

Concurrent Litigation Relevant to this Action

[11] Similar litigation to this action was commenced in British Columbia and Québec. Plaintiffs in these Canadian proceedings reached a settlement with the defendant, Chunghwa Picture Tubes, Ltd. ("Chunghwa"), which was approved by the courts in Ontario, B.C. and Québec. The terms of that settlement require Chunghwa to provide significant cooperation to the plaintiffs: *Fanshawe College v. LG Philips LCD et al* (26 April 2010) London, 54054 C.P. (Ont. S.C.J.).

Analysis: The Test for Certification

[12] 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.

[13] The plaintiff must show some basis in fact for each of the certification requirements in s. 5(1), other than the 5(1)(a) requirement that the pleadings disclose a cause of action: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 25 ("*Hollick*").

[14] If the s. 5(1) requirements are met, certification is mandatory. As per s. 5(5), a certification motion is not a determination of the merits of the proceeding. Section 6 of the *CPA* lists some grounds upon which the court should not refuse to certify a class proceeding:

> The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
>
> 2. The relief claimed relates to separate contracts involving different class members.

3. Different remedies are sought for different class members.

4. The number of class members or the identity of each class member is not known.

5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

Section 5(1)(a): Do the pleadings disclose a cause of action?

[15] For the purposes of this motion, the defendants do not dispute that the claim discloses a cause of action.

[16] *Vitapharm Canada Ltd. v. F. Hoffmann-La-Roche Ltd.*, [2005] O.J. No. 1118 at para. 17 (S.C.J.) lists the applicable principles in determining whether pleadings disclose a cause of action under s. 5(1)(a) of the *CPA*:

> (a) no evidence is admissible for the purpose of determining [this question];
>
> (b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
>
> (c) the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;
>
> (d) the novelty of the cause of action will not militate against the plaintiff;
>
> (e) matters of law not fully settled in the jurisprudence must be permitted to proceed; and
>
> (f) the statement of claim must be read generously…

[17] I am satisfied that the statement of claim in this action adequately advances the cause of action of a conspiracy to fix, raise, maintain or stabilize prices of LCD products sold in Canada and worldwide.

Section 5(1)(b): Is there an identifiable class?

[18] As stated in *Bywater v. Toronto Transit Commission* (1998), 83 O.T.C. 1 at para. 10, class definition serves three purposes:

> (a) identifying those persons who have a potential claim for relief against the defendants;
>
> (b) defining the parameters of the lawsuit so as to identify those persons who are bound by the results; and
>
> (c) describing who is entitled to notice pursuant to the *CPA*.

[19] As held in *Hollick, supra,* at paras. 17, 20 and 21, the class must be defined by reference to objective criteria, there must be some rational relationship between the class and common issues and the class must not be unnecessarily broad—that is, the class could not be defined more narrowly without arbitrarily excluding potential members who share the same interests in the resolution of the common issues. As there is a necessary interaction between the definition of class members and the common issues under s. 5(1)(c) of the *CPA*, the class action may not be manageable if the class definition is too broadly drawn.

[20] The plaintiff proposes the following class definition:

> All persons in Canada (excluding defendants and their respective parents, employees, subsidiaries, affiliates, officers and directors) who purchased LCD Panels* or LCD Products** directly from a defendant or any entity affiliated with a defendant, an Original Equipment Manufacturer*** or a Distributor**** in Canada between January 1, 1998 and December 11, 2006.
>
> *LCD Panels means liquid crystal display panels that are 10 inches or larger, measured diagonally.
>
> **LCD Products means televisions, computer monitors and laptops containing LCD Panels.

> ***Original Equipment Manufacturer means any of the following entities or any company affiliated with any of the following entities: Acer Inc. (including the Gateway brand), Apple Canada Inc., Compaq Computer Corporation, Dell Corporation, Fujitsu Limited, Hewlett-Packard Development Company, L.P., IBM Corporation, JVC Canada, LG Electronics, Lenovo Group Limited, Mitsubishi Electric Corporation, Panasonic Corporation, Koninklijke Philips Electronics N.V., Polaroid Corporation, Prima Technology Inc., Proview Technology Inc., TTE Corporation (including the RCA brand), Sony of Canada Ltd., Stealth Computer Corporation, ViewSonic Corporation, and Westinghouse Digital Electronics.
>
> ****Distributor means any of the following entities or any company affiliated with any of the following entities: ALC Micro, Computer Distributors of Canada, Comtronic Computer Inc., D&H Distributing Co., Eprom Inc., Funai Electric Co., Ltd., Ingram Micro Inc., Pro-Data Inc., Supercom, Synnex Canada Limited, Tech Data Canada Corporation, and TTX Canada.

[21] This class includes what the plaintiff terms as "primary" and "secondary" purchasers, as distinguished by the plaintiff from direct and indirect purchasers. A primary purchaser is someone who purchased an LCD Panel from a defendant or an LCD Product from a defendant or a named OEM or Distributor. A secondary purchaser is someone who purchased an LCD Panel from a primary purchaser of an LCD Panel or someone who purchased an LCD Product from a primary purchaser of an LCD Product. The plaintiff asserts that this categorization is more appropriate than direct and indirect purchasers, as it better accommodates vertical integration, which is common in the LCD industry.

[22] To remain manageable, the proposed class should not be overly broad. Accordingly, it must be defined by objective criteria and be rationally connected to the proposed common issues. In that regard, I note these comments by McLachlan, C.J.C. in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 ("*WCSC*") at paras. 38 and 39:

> 38. ... the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch, *supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, Civil Procedure (2nd ed. 1993), at pp. 726-27, at paras. 4.190-4.207; Friedenthal, Kane and Miller, Civil Procedure (2nd ed. 1993), at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.
>
> 39. ...there must be issues of fact or law common to all class members. ... 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. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action.

[23] The plaintiff accepts the requirements cited in *WCSC*, *supra*, and submits that the proposed class is defined by objective criteria, unconnected to the outcome of this action. The plaintiff further states that the proposed class is rationally connected to the proposed common issues and that the class is not overly broad. The defendants dispute these characterizations.

Rational Connection

[24] The plaintiff proposes the following common issues:

> (a) Are the Defendants, or some of them, liable for conspiracy to fix prices for LCD Panels and/or Products?

(i) Did the Defendants and/or any unnamed co-conspirators unlawfully conspire with each other to limit or lessen, unduly, the production of LCD Panels, or to enhance unreasonably the price of LCD Panels?

(ii) Was the Defendants' unlawful conduct directed towards the plaintiff and other class members?

(iii) Did the Defendants know, or ought they have known, in the circumstances that injury to the Plaintiff and other class members was likely [to] result?

(iv) Did the Plaintiff and other class members suffer injury?

(b) Did the Defendants, or some of them, breach Part VI of the *Competition Act* giving rise to liability pursuant to s. 36 of the *Competition Act?*

(i) Did the Defendants and/or any unnamed co-conspirators conspire with each other to limit or lessen, unduly, the production of LCD Panels, or to enhance unreasonably the price of LCD Panels?

(ii) Did the Plaintiff and other class members suffer injury?

(c) Over what period of time did the conspiracy take place?

(d) Over what period of time did the conspiracy affect the price of LCD Panels or LCD Products?

(e) Did the Defendants take affirmative or fraudulent step[s] to conceal the conspiracy?

(f) Can damages be measured on an aggregate, class-wide basis and if so, what are the aggregate damages?

(g) Was the conduct of the Defendants, or any of them, such that they ought to pay global exemplary or punitive damages to the Plaintiff and other class members?

(h) Should the full costs of investigation in connection with this matter, including the cost of the proceeding or part thereof, be fixed or assessed on a global basis pursuant to section 36 of the *Competition Act* and if so, in what amount?

[25] 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.
>
> **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 denying 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.

[26] The plaintiffs have included 36 Named OEMs and Distributors in the class definition. The defendants state that the plaintiff has not filed any evidence to justify the inclusion of those parties or linking them to the LCD Panels and Products manufactured by the defendants. They state that the absence of evidence linking these entities to the defendants makes their inclusion in the class definition arbitrary. In response, the plaintiff states it was forced to rely solely on publicly available information. It intends to

amend this list, once written interrogatories and discoveries have been completed. In my view, this is a practical solution to the concern raised by the defendants.

[27] The common issues seek to determine whether a conspiracy or a breach of the *Competition Act* occurred and whether damages should flow to the proposed class members from such alleged wrongful conduct. Financial injury may have moved from the defendants through their customers, the Named OEMs and Distributors, to the class members. Thus, the class definition, which includes those parties who purchased from a Named OEM or Distributor, is, in my view, rationally connected to the common issues.

[28] The plaintiff states that the proposed class was designed to capture most of the large volume purchasers of LCD Panels and LCD Products. Absent the limitation to the class, as advanced by the plaintiff, the proposed class would have included all purchasers of LCD Panels and Products in Canada and might, for that reason, have become unmanageable. The plaintiff states that its proposed class definition is intended to simplify the quantification of damages and the measurement of pass-through. For reasons noted by the plaintiff, I find that the limitation of the proposed class is not arbitrary. I note that it is not a legitimate complaint that the plaintiff has defined the proposed class in a way that would make its claim more amenable to certification: *Pearson v. Inco Ltd.*, [2005] O.J. No. 4918 (C.A.) at para. 62. The decision to limit the class for purposes of certification, in this instance, is a legitimate exercise of counsel's discretion.

Section 5(1)(c): Do the claims of the class raise common issues?

[29] The phrase "common issues" is defined in s. 1 of the *CPA*:

> (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.

This definition represents a "conscious attempt by the Ontario legislature to avoid setting the bar for certification too high": *Vitapharm Canada Ltd. v. F. Hoffmann La-Roche Ltd*, *supra* at para. 33.

[30] In *WCSC*, *supra*, McLachlan C.J.C. summarized the basic principles governing a s. 5(1)(c) analysis at para. 39, *supra.*

[31] In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, the Court of Appeal noted at para. 53 that "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." Yet, common issues must be capable of determination on a class-wide basis: *Risorto v. State Farm Mutual Automobile Insurance Co.*, [2007] O.J. No. 676 at para. 45 (S.C.J.).

Experts' Opinions

[32] The issues which are the most controversial on this certification motion and which impact and overlap with many of the proposed common issues are:

(a) whether class members would have been injured by the defendants' alleged conspiracy to raise, fix, maintain and stabilize prices for LCD Panels and LCD Products.

(b) whether there exists a formulaic method or methods to determine the amount of injury suffered by class members based on common evidence.

[33] To address these questions, each side commissioned expert reports by economists, Dr. Russell Lamb for the plaintiff and Margaret Sanderson for the defendants.

Lamb Report: Synopsis

- Suppliers for production of LCD Panels are geographically concentrated, principally in Asia and are few in numbers, contracting with most LCD manufacturers, some of whom are vertically integrated into components production.

- On average, LCD Panels account for more than 70% of the cost of computer monitors, 25% of notebook PCs and more than 70% of televisions. After assembly, the final products are sold by manufacturers (to include defendants and primary purchaser OEMs) to purchasers of LCD Products, including distributors, retailers and end-users.

- Nearly all defendants produce both large and small LCD Panels, however, large LCD Panels dominate in terms of revenue.

- The global market for LCD Panels is large, with revenues of U.S. $90.7 billion in 2007. Canada accounted for approximately 2.3% and 1.8% of global LCD Panels used in notebook PCs and computer monitors respectively in 2006.

- For purposes of his report, he assumed that the defendants engaged in a conspiracy to coordinate prices at which to sell LCD Panels and LCD Products. He concluded that all class members would have been injured by the existence of a conspiracy such as the one the plaintiff alleges, in that they paid more for LCD Panels and LCD Products than they would have paid, but for the existence of the alleged conspiracy.

- The production of LCD Panels is characterized by a significant degree of concentration. The defendants, in fact, control a large share of the market. The vast majority of the LCD Panels contained in products and sold in Canada are manufactured by the defendants.

- The markets for both LCD Panels and LCD Products are characterized by high barriers to entry, which make it difficult for new firms to enter the market quickly in response to higher prices.

- The technological barriers and the prolonged development periods necessary to qualify panel products mean that the LCD TV Panel business concentrates in the hands of just a few suppliers.

- Notebook PC and LCD monitor brands are well-established with just a handful of players accounting for a large percentage of the world's market.

- Because there are high barriers to entry in both the production of LCD Panels and in the market for LCD Products, a conspiracy, such as the one alleged, would have been able to operate without the threat of entry by new competitors acting to limit price increases.

- The pricing structure for LCD Products means that a factor such as this alleged conspiracy would have resulted in higher prices for all class members.

- Secondary purchasers are those who purchased LCD panels or LCD products from primary purchasers such as non-defendant OEMs or Distributors. Injury to these secondary purchaser class members arises if the higher prices paid by primary purchasers are passed through, at least in part, in the prices they charged their customers for these products.

- At least some of the higher prices paid by non-defendant OEMs and Distributors would be passed on to class members who purchased from them.

- A method exists to determine class-wide injury using evidence common to all class members.

- To calculate overcharge, he proposes to use a method known as "benchmark analysis," in which the overcharge is calculated by comparing the prices that arose as a result of the alleged conspiracy with the prices that prevailed for the product in question in some market in which there was non-conspiratorial pricing. This methodology is an accepted method for calculating injury in the field of anti-trust economics. It has been widely used in calculating injury that arises from collusive pricing of the type alleged here.

- To achieve control for changes and other variables which affect prices for LCD Panels and LCD Products in his benchmark comparison, he proposes to use a statistical technique known as "multiple regression analysis," commonly used in economics to explain the effect of a number of variables upon some other variable.

- Using economic analysis, it will be feasible to determine the extent to which higher LCD Panel prices were passed through to secondary purchasers by OEMs and distributors.

- The type of multiple regression analysis employed in estimating the pass-through of higher input costs into final product prices is not meaningfully different than the regression analysis which could be used to determine

damages. This type of multiple regression analysis to measure pass-through has been widely used in economic research for many years.

- Multiple regression analysis can be used to reliably calculate both damages and the extent of pass-through.

- In a market which is not perfectly, but nevertheless highly competitive, such as the LCD market, firms pass-through a significant amount of the overcharge to the next level of distribution, but not to the extent of 100%.

- A benchmark analysis with multiple regression models of prices for LCD Panels and LCD Products during and after the alleged conspiracy can determine the extent by which prices paid by primary purchasers were higher. The extent to which these higher prices were passed through by certain OEMs and Distributors to secondary purchasers can be measured using multiple regression analysis.

Sanderson Report: Synopsis

- She was retained by the defendants to address:

  (a) whether a class-wide method exists to determine the existence of any harm and the extent of such harm, if it exists, to members of the proposed class; and

  (b) whether the approach proposed in the Lamb Report provides a workable class-wide method to address these issues.

- Direct purchasers will only suffer harm from the conspiracy if they paid overcharges arising from the cartel and were unable to pass on any overcharges to their customers (referred to in anti-trust economics as "pass-through"). Indirect purchasers will only suffer harm from the conspiracy if direct purchasers pass on some (or all) of any cartel overcharges to them and the indirect purchasers are unable to further pass on these overcharges to their customers.

- It is entirely possible that any overcharges that flowed "in" to members of the Proposed Class and were then passed on "out" of the Proposed Class, in which case there would be no harm suffered from the alleged cartel.

- To know if members of the Proposed Class suffered harm requires assessing:

  (a) whether there were any overcharges, and if so, in what amount;

(b) the extent of pass-through of any overcharges from the defendants and liable non-defendant LCD Panel suppliers through all stages of the various individual suppliers' distribution chains to the members of the Proposed Class; and

(c) the extent of any pass-through from individual members of the Proposed Class to their customers outside of the proposed class.

- Dr. Lamb's methodology to determine the extent of harm fails to consider the extent to which any overcharges or pass-through at all stages of the various distribution chains resulted in pass-through out of the class.

- In her view, Dr. Lamb's claim that all class members or primary purchasers would have suffered injury is flawed, at least, in these particulars:

  (a) The supplier-buyer interactions along the various distribution chains are highly complex. As such, any pass-through of overcharges would not be uniform;

  (b) Dr. Lamb does not consider important aspects of the specific market conditions that would govern price negotiations between "primary" and "secondary" purchasers.

- The market conditions for LCD Panels and LCD Products do not support an inference of harm to all members of the Proposed Class. Individualized inquiries are needed.

- The methodology proposed by Dr. Lamb does not provide a workable method for determining the existence of harm or for quantifying injury or harm on a class-wide basis.

- The existence of and variation in the amount of any overcharges at each level of the distribution chain depends on a number of key factors which make estimating the extent of pass-through complicated and difficult, even theoretical.

- Individualized inquiries would be needed to determine the existence and extent of any initial overcharges and any subsequent pass-through to members of the Proposed Class and beyond.

- Dr. Lamb's market analysis fails to address many market characteristics that appear to indicate that not all members of the Proposed Class would necessarily have suffered harm at all.

- Obtaining the necessary data to evaluate whether pass-through has occurred at each of the relevant levels of the various distribution chains for each defendant and for each rival non-defendant LCD Panel supplier and their subsequent customers over the class period is likely to be impossible from a practical perspective.

- The methodology proposed by Dr. Lamb does not provide a workable method for quantifying harm on a class-wide basis. Quantifying harm would require individualized inquiries into the products and the conditions under which they were manufactured and supplied, along the multiple stages of the various distribution chains and over time.

[34] In his reply report, Dr. Lamb responds to the opinions advanced by Ms. Sanderson. In his view:

- Ms. Sanderson's analysis is unreliable and offers limited insight into the questions he analyzed in his initial report. He finds a number of Ms. Sanderson's conclusions to be factually incorrect.

- Ms. Sanderson mistakenly opines that the analysis he proposed would be impossible when her own analysis establishes only that it is "difficult." Analysis that is merely "difficult" or "complex" is not impossible.

- the additional evidence provided by Ms. Sanderson in her report leads him to reaffirm his opinions that:

  (a) It is possible to use evidence which is common to all members of the class to demonstrate that all class members have been harmed as a result of the alleged misconduct;

  (b) Multiple regression models are feasible and can be used to reliably calculate damages owed to class members;

  (c) It is possible to measure pass-through of overcharges to secondary purchasers.

[35] I am faced with reports prepared by two experts in the field of economics, each advancing contradictory opinions. In determining the use I am to make of these reports at this preliminary procedural stage of the proceedings and the degree to which I am to

resolve these contradictions, I turn to the B.C. Court of Appeal in *Pro-Sys Consultants Ltd. v. Infineon Technologies A.G.*, [2009] B.C.J. No. 2239 at paras. 64-66, 68:

> 64. The provisions of the *CPA* should be construed generously in order to achieve its objectives: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby making economical the prosecution of otherwise unaffordable claims); and behavior modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation): *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 26-29 [*Western Canadian Shopping Centres*]; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15 [*Hollick*].
>
> 65. The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: *Hollick* at para. 16. The burden is on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading disclose a cause of action: *Hollick*, at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one—it requires only a "minimum evidentiary basis": *Hollick*, at paras. 21, 24-25. ... As stated in *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50 [*Cloud*],
>
> > [O]n a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.
>
> 66. Accordingly, where expert opinion evidence is adduced at the certification hearing, as it was here, it should not be subjected to the exacting scrutiny required at trial. On this point, I adopt the remarks of J.L. Lax J. in *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.) at para. 76:
>
> > ...where expert evidence is produced on a motion for certification, the nature and amount of investigation and testing required to

> provide a basis for preliminary opinion will not be as extensive as would be required for an opinion to be given at trial. It follows that some lesser level of scrutiny is applied to the opinions offered, if they are otherwise admissible: *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 at para. 19 (Sup. Ct.).
>
> ...
>
> 68. The appellant was required to show only a credible or plausible methodology. It was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases. Ms. Sanderson gave evidence that aggregate harm had been estimated by two experts in the U.S. litigation. As well, it appears from the U.S. plea agreements that the Department of Justice was prepared to prove that the agreed fines were justified as representing twice the gross gain or the gross loss resulting from the price-fixing conspiracy. The dispute here is over whether total gain or loss can be determined as a practical matter on the particular facts of this case. Those facts have not yet been fully developed and it was therefore premature of the chambers judge to reject Dr. Ross' opinion. The close examination to which he subjected it should have been left for the trial judge, whose task it will be to evaluate the conflicting expert opinions and to decide what weight to give to them.

[36] To the extent that Dr. Lamb and Ms. Sanderson advance different opinions, this is not the stage at which to resolve these conflicts. It should and will be left to the trial judge on the full and comprehensive record to conclusively resolve these divergent opinions.

[37] For the present purposes of certification, I am satisfied that the Lamb Report demonstrates a proposed method for determining damages that is "not so insubstantial as to amount to no method at all": *In re: TFT-LCD (Antitrust Litigation)*, *supra* at para. 22. Dr. Lamb states that it is plausible to measure the extent to which an overcharge was passed on to secondary purchasers using a multiple regression methodology. He states that in a highly competitive market such as this, there is a significant amount of pass-through, but not complete pass-through. The absence of 100% pass-through focuses the

litigation on the issue of quantification of damages, not the existence of harm to class members. I note that Dr. Lamb's methodology is similar to that provided in the U.S. direct purchasers' case of *In re TFT-LCD, supra*. For purposes of certification, I find that Dr. Lamb's Reports are evidence of a viable methodology for the determination of loss on a class-wide basis.

Single or Multiple Conspiracies? Issues a(i-iii), b(i) and c-e

[38] The plaintiff asserts that there was a single, overarching conspiracy to fix prices of LCD Panels and Products. The plaintiff further asserts that this conspiracy would necessarily have operated in the markets for both LCD Panels and LCD Products, as some defendants were vertically integrated and utilized a large portion of the LCD Panels they produced in the manufacture of LCD Products. Dr. Lamb concluded in his report that a price-fixing conspiracy in the LCD market, which contained several vertically integrated defendants, would only have been tenable if prices were inflated for both Panels and Products. The defendants disagree with this characterization.

[39] The defendants assert that:

(a) the findings of the Department of Justice (DoJ), in the U.S. investigation involving many of these defendants, do not support an allegation that there was a single conspiracy between all of the defendants to fix the prices of LCD Panels and LCD Products, especially since not every defendant manufactured Panels and Products throughout the class period.

(b) The U.S. guilty pleas outlined above, which resulted from the DoJ investigation, do not specifically reveal a single over-arching conspiracy.

(c) The facts detailed in the above plea agreements are more reflective of a series of conspiracies, only some of which temporarily overlap.

(d) Since these allegations relate to disparate companies and disparate conspiracies, there could not have been a single over-arching conspiracy, as the plaintiff alleges.

[40] The defendants assert that proposed common issues a(i-iii), b(i) and c-e are not common, as they relate to the existence and nature of multiple conspiracies. As the conspiracies would relate to different companies and different products, class members would only have an interest in the conspiracies that affected their own purchases. However, if there was a single conspiracy, as asserted by the plaintiff, resolution of the common issues would be a "substantial ingredient" to every class member's claim.

[41] At this procedural stage of the action, "the court is ill-equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue" (*Cloud*, *supra* at para. 50).

[42] Although the defendants urge against the finding of a single over-arching conspiracy, they have not provided any evidence that would be inconsistent with or would foreclose the possibility of such a conclusion. The U.S. LCD decision, *In re: TFT-LCD (Flat Panel) Antitrust Litigation*, *supra* at para. 25, rejected the defendants' attempts to re-characterize the plaintiffs' allegations of a single over-arching conspiracy. In that decision, reference to "Crystal Meetings" does not foreclose the conclusion that LCD manufacturers of all types met periodically to discuss price-fixing issues.

[43] I find that the plaintiff has provided "some basis in fact" to support a finding of a single over-arching conspiracy, at least for certification purposes.

The Alleged Harm: Issues (a)(iv) and (b)(ii)

[44] A finding of conspiracy in itself is not sufficient for certification purposes. The plaintiff must also establish the fact of harm: G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed. (Toronto: Carswell, 2010) at 734-35:

> The essence of tortious conspiracy may be the agreement between those combining, but *no action can be maintained unless damage has been suffered by the plaintiff.* This entails the performance of acts by the defendants the result of which is such damage... *The plaintiff must allege actual loss before the action will be allowed to go to trial* and proof of such loss must be given before the action will succeed. [Emphasis added and footnotes removed.]

[45] In support of their position that this is a case of multiple conspiracies and that the requirement of individual assessment of damages collectively would overwhelm the common issues making this case unsuitable for certification, the defendants point to *Chadha v. Bayer Inc.*, [2003] O.J. No. 27 (C.A.) ("*Chadha*").

[46] I shall now review in some detail *Chadha* and its application to this certification motion.

[47] The defendants state that *Chadha* stands for the following general propositions:

(a) For claims in conspiracy or under section 36 of the *Competition Act*, harm is a prerequisite to liability. Without proof of loss or harm, there can be no liability;

(b) For a price-fixing claim involving indirect purchasers, harm cannot be proven without demonstrating pass-through;

(c) In a price-fixing class action, pass-through will only be a common issue if the plaintiff provides an evidentiary basis—such as a methodology—to demonstrate that the question of pass-through can be answered commonly for every class member based on common evidence;

(d) If the existence of pass-through is not a common issue, then liability is not a common issue. The liability of the defendant would have to be determined by way of an individual inquiry for each class member; and

(e) Given the complexity of the pass-through inquiry and the size of the class in most price-fixing class actions, a class action requiring individual determinations of pass-through would not be manageable and would "undermine" judicial economy, and is therefore not a preferable procedure.

[48] The defendants' factum provides this helpful summary of *Chadha*, *supra*:

> 53. *Chadha* was a proposed indirect purchaser class action alleging a conspiracy amongst the manufacturers of iron oxide pigments. The pigments are used to colour bricks, paving stones and related construction materials. The plaintiffs submitted that as a result of the alleged price-fixing they had overpaid for their newly-constructed homes, which had been built with bricks that had been coloured with pigments manufactured by the defendants. They claimed damages for conspiracy as well as breach of the *Competition Act* pursuant to section 36(1). The proposed class consisted of "all homeowners and other end users" of bricks and other construction materials containing the pigments.
>
> 54. *Chadha* was certified at first instance. The Divisional Court overruled the decision. The Court of Appeal agreed with the Divisional Court that the action was not certifiable. The Supreme Court of Canada denied leave to appeal.
>
> 55. The majority of the Divisional Court noted that loss is an essential element of liability for both the common law and the statutory claims and that loss could not be proven without establishing that the overcharge was "passed through" the distribution chain to the class members. The pass-through issue could only be addressed on an individual basis and therefore liability could not be a common issue. The Court of Appeal agreed with the majority of the Divisional Court on this point, stating:
>
> > The evidence presented by the [plaintiffs] on the motion does not satisfy the requirement prescribed by the Supreme Court in *Hollick* of providing sufficient evidence to support certification. The evidence of the [plaintiffs'] expert assumes the pass-through of the

> illegal price increase, but does not suggest a methodology for proving it or for dealing with the variables that affect the end price of real property at any particular point in time. The motion judge focused on the expert's opinion that the loss could be measured, rather than on how any such loss could first be established on a class-wide basis. [Emphasis added.]
>
> 56. ...because liability could not be established on a class-wide basis, the Court of Appeal also concluded that an aggregate assessment would not be available at a common issues trial.
>
> 57. In determining whether a class action was the preferable procedure, the Court of Appeal, following *Hollick*, emphasized the importance of analyzing the common issues "in relation to the claims as a whole." The Court of Appeal criticized the motions judge for limiting the analysis and ignoring the impact of issues that would remain following the common issues trial.

[49] To determine the application of the principles enunciated in *Chadha* to the present case, it is helpful to review an aspect of the reasoning of the Court of Appeal in *Chadha*:

> 17 ... The majority of the Divisional Court also focused on the multitude of variables that can affect the price of a building, including regional differences and delivery costs, and the fact that "... the product in question, iron oxide, is used merely as a small component in another product or series of products and the alleged overcharge is only a trivial part of the purchase price of residential or commercial buildings, which are highly individualized end products" (para. 23), as well as many subjective factors, such as the relative bargaining skills of the purchasers and vendors...
>
> 18 The Divisional Court further found that establishing the price-fixing conspiracy would not advance the litigation in a legally material way, because the balance of the action would be an unmanageable series of individual trials of the "pass-on" issue. Therefore, certifying the class action would not further the purposes of the *Class Proceedings Act*, particularly judicial economy, but also access to justice and behaviour modification, the purpose singled out by the motion judge. The Divisional Court was of the view that the procedures in the *Competition Act* were better suited to the goal of behaviour modification

in this case, and noted that an investigation under the *Competition Act* had been conducted and discontinued by the Director of Investigation and Research of the Competition Bureau.

30 ... the motion judge erred by relying on the expert evidence filed by the appellants as the basis for the certification order. That evidence does not address the issue of what method could be used at a trial to prove that all end-purchasers of buildings constructed using some bricks or paving stones that contain the respondents' iron oxide pigment overpaid for the building as a result. Rather, the appellants' expert effectively assumes that higher costs of products containing the respondents' iron oxide pigment would have been passed on to end-users, reasoning that they would have been willing to pay the higher cost because the amounts in question were so minimal. ... The expert's models are based on the assumption of a full pass-through of the price increase of the iron oxide to the homebuyers. However, *it is that assumption that is the very issue that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified as such.* [Emphasis added.]

40 ... the appellants presented no evidence from industry representatives to explain how the manufacturers and distributors of bricks and the developers of new homes price their products, and in particular, whether there is a direct pass-through of the price of every component into the sale price of all homes, the relevance of the value of the land component, and how other factors such as the real estate market and the individual bargaining of the purchase and vendor affect the price.

45 The Divisional Court noted the many problems of proof facing the appellants 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 appellants would have to show that the price increase (or a part of it) was passed through from the respondents to the building materials manufacturer and distributor, to the builder, to the purchaser and on to any subsequent purchaser. If the price increase was absorbed at any point, the chain would be broken. The problem is compounded by the fact that the iron oxide pigment forms such a minimal part of the whole structure and therefore a similarly minimal portion of the purchase price of a building.

46 As noted above, neither the variables nor the issue of how to prove the flow of the price increase through the distribution chain were addressed by the appellants' expert in his evidence. Nor does he discuss the effect of the market on real estate prices and the relative effects on the purchase price of (a) the market, (b) the value of the land, (c) the value of the building, and (d) how one assesses the value of the component parts of the building at any particular point in time, remembering that the proposed class members are not only purchasers of new homes, but of resale homes as well, and that not all homes were constructed using the impugned materials.

49 ... s. 24 of the *Class Proceedings Act* 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.

61 Section 24(1)(b) is a mechanism for assessing damages where there is no issue of liability. ... By seeking to equate the respondents' gain with the class members' alleged loss, the appellants effectively skip over the process of determining who in the chain, beginning with the direct purchasers from the respondents, absorbed the loss. ... The effect of the appellants' approach is to attribute the entire loss to the indirect or end-purchasers rather than to determine whether those parties suffered loss as required by s. 36(1) of the *Competition Act* and as part of the common law causes of action.

64 ... in this case, the obstacles to an effective class proceeding override its potential benefits.

65 ... the question of whether and how consumers will be able to use class actions to obtain relief from price-fixing by suppliers and manufacturers remains an open one in this jurisdiction. The appellants were unsuccessful in this case because they did not present the evidentiary basis for a certifying court to be satisfied that loss as a component of liability could be proved on a class-wide basis. Whether such evidence could have been obtained is not clear.

66 The Divisional Court's approach suggested that it could not: that the variables in house purchase prices were such that the type of evidence that would have been required to show "pass-through" on a class-wide basis would not have been available in this case, in large part because of the nature of real estate and the individualized pricing factors

> on each sale. The Divisional Court's concerns follows the U.S. approach as defined in the *Illinois Brick* and *Hanover Shoes* cases.
>
> 68 In this jurisdiction it remains to be determined whether in a particular case a sufficient evidentiary record can be brought before a certifying court to satisfy that liability can be proved as a common issue. Whether it can be done is a question left open for future cases.

[50] In *Chadha*, the Court of Appeal confirmed that for common law claims in conspiracy or actions under s. 36 of the *Competition Act*, harm is a prerequisite to liability. Furthermore, harm cannot be proven without demonstrating pass-through, and in a class action, pass-through can only be a common issue if the plaintiff provides a methodology for determination of pass-through on a class-wide basis. In *Chadha*, the complexity of the pass-through inquiry and the failure of the plaintiffs to propose the requisite methodology meant that liability was not a common question.

[51] As it relates to this certification motion, I agree with Leitch J. in *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2010] O.J. No. 2472 at para. 51 that *Chadha* stands for these propositions:

> a) Where damages are sought on behalf of indirect purchasers whose claims depend upon damages suffered as a result of price increases being passed through to such purchasers, the action will be unmanageable (and therefore not preferable under paragraph 5(1)(d) of the *CPA*) if injury and loss must be proven on an individual basis.
>
> b) If the plaintiff seeks to certify proof of loss as a common issue (thereby addressing the foregoing unmanageability problem), it must be shown, by admissible, cogent and persuasive evidence, that there exists some methodology by which loss can be proven on a class-wide basis;
>
> c) Evidence to demonstrate to the certification court that loss will be provable on a class-wide basis at the common issues trial must necessarily take the form of expert economic evidence.

[52] The reasons noted by the Court of Appeal in *Chadha* leading to the conclusion that *Chadha* could not be certified, in my view, are distinguishable from the issues on this

motion. Without reproducing an exhaustive list of what, in my view, distinguishes *Chadha* from the present case, included are these:

(a) iron oxide, the product in question in *Chadha* was but a small component of a series of necessary products to construct the buildings in question;

(b) the alleged overcharge of the iron oxide represented only a trivial part of the purchase price of each building;

(c) a number of subjective factors played a part in arriving at the sale price of each building, including the relative bargaining skill of each of the parties involved.

[53] The Court of Appeal in *Chadha*, *supra*, noted:

> 18. ...The Divisional Court was of the view that the procedures in the *Competition Act* were better suited to the goal of behavior modification in this case, and noted that an investigation under the *Competition Act* had been conducted and discontinued by the Director of Investigation and Research of the Competition Bureau.

There is no reference here on this motion either that the procedures in the *Competition Act* are better suited to the goal of "behavior modification" or that an investigation under the *Competition Act* was either started or discontinued. Contrary to the opinion advanced in the Lamb Report, the expert evidence in *Chadha* assumed a full pass-through of the price increase.

[54] For purposes of certification, I accept that the opinion of Dr. Lamb rises to the level of "a credible or plausible methodology" process as required by *Infineon*, *supra* at para. 68. Without assuming harm, Dr. Lamb provides the opinion that:

(i) It is possible to use evidence which is common to all members of the class to demonstrate that all class members have been harmed as a result of the alleged misconduct;

(ii) The multiple regression models are feasible and can reliably be used to calculate damages owed to class members;

(iii) It is possible to measure the pass-through of overcharges to secondary purchasers in this matter; and

(iv) Overcharges would not entirely be passed out of the class.

[55] I find that the Lamb Report details a viable methodology for proving loss on a class-wide basis. I also note that the methodology proposed by Dr. Lamb is similar to that approved by the court in the U.S. indirect purchasers' case, *TFT-LCD, supra.*

[56] I again note this comment by the Ontario Court of Appeal in *Chadha* at para. 65:

> ...the appellants were unsuccessful in this case because they did not present the evidentiary basis for a certifying court to be satisfied that loss, as a component of liability, could be proved on a class-wide basis. Whether such evidence could have been obtained is not clear.

[57] I find that the plaintiff has provided an evidentiary basis that loss as a component of liability could be proved on a class-wide basis.

Aggregate Damages: Issue f

[58] Section 24(1) of the *CPA* provides:

> The court may determine the aggregate or part of a defendant's liability to class members and give judgment accordingly where,
>
> (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.

[59] For s. 24(1) to apply, the plaintiff must provide a "credible and plausible methodology" for establishing aggregate damages on a class-wide basis: *Irving Paper Ltd. v. Atofina Chemicals Inc., supra*, at para. 62. The Ontario Court of Appeal stated in *Markson v. MBNA Canada Bank*, [2007] O.J. No. 1684 at para. 44 and as noted with

approval by that court in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466 at para. 57:

> ...on a certification motion, a plaintiff is only required to establish that 'there is a reasonable likelihood that the preconditions in s. 24(1) of the CPA would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues.'

The ultimate decision of whether s. 24 of the CPA applies is that of the trial judge: *Cassano v. Toronto-Dominion Bank*, [2007] O.J. No. 4406 at para. 52 and *Quiznos, supra*, at para. 58.

[60] As already noted, I find that Dr. Lamb has advanced a "credible and plausible methodology" for establishing aggregate damages and pass-through. He opines that aggregate damages can be assessed using a "benchmark" analysis. He contemplates using the "before and after approach" to determine the "but for" price. He then proposes to use a multiple regression analysis to account for any other factors that might have influenced the supply and demand of LCD Panels and LCD Products. He proposes to use the multiple regression analysis to determine pass-through.

[61] The multiple regression analysis has been accepted by Canadian courts as a "credible and plausible methodology" for establishing aggregate damages and pass-through: *Axiom Plastics Inc. v. E.I. DuPont Canada Co.*, [2007] O.J. No. 3327 at paras. 146-150; *Pro-Sys Consultants Ltd. v. Infineon, supra* at para. 68.

[62] I find that the plaintiff has advanced a "credible and plausible methodology" for establishing aggregate damages and pass-through. Thus s. 24(1) is applicable.

Punitive damages: Issue g

[63] In *Dobbie v. Arctic Glacier Income Fund*, 2011 ONSC 25 at paras. 229-230, I relied on Justice Strathy's findings in *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, wherein he accepted the test enunciated in *Robinson v. Medtronic*, [2009] O.J. No. 4366

(S.C.J.) on the facts and concluded that "there is no need for individual proof of loss to enable a common issues judge to assess punitive damages." Accordingly, proposed Common Issue g is certified as a common issue.

Section 5(1)(d): Is a class proceeding the preferable procedure?

[64] The Ontario Court of Appeal in *Markson v. MBNA Canada Bank*, [2007] O.J. No. 1684 articulated the "preferable procedure" principle at para. 69:

> 1. The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behavior modification;
>
> 2. "Preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute; and
>
> 3. The preferability determination must be made by looking at the common issues in context, meaning, the importance of the common issues must be taken into account in relation to the claims as a whole.

[65] The comments of Cumming J. at para. 40 of *Vitapharm*, *supra*, noting that a class action in that case was a "fair and manageable process," apply equally to this action:

> 40 .... for class members there are no "alternative avenues of redress apart from individual actions." Further, "individual actions would be less practical and less efficient than a class proceeding." Thus, certification would increase access to justice.

[66] Class actions serve judicial economy by avoiding "unnecessary duplication in fact-finding and legal analysis": *Hollick*, *supra* at para. 15.

[67] Also, as noted by Cumming J. in *Alfresh Beverages Canada Corp. v. Hoechst A. G.*, [2002] O.J. No. 79 at para. 16, private actions in price-fixing cases function "as a regulator in the public interest for public policy objectives."

[68] As I have concluded that liability is a common issue under s. 5(1)(c) of the *CPA*, I find that the objectives of judicial economy, access to justice and behavior modification apply in the instant case and that a class action is the preferable procedure.

Section 5(1)(e): Is there a representative plaintiff who:

i. will fairly and adequately represent the interests of the class?

ii. has produced a workable litigation and notification plan?

iii. does not have conflicts of interest with other class members on the common issues?

Is Fanshawe College a suitable representative plaintiff?

[69] The defendants raise two concerns about the suitability of the proposed representative plaintiff. First, the defendants submit that this litigation itself, and Fanshawe's proposed role as representative plaintiff, is *ultra vires* Fanshawe's enacting legislation. Citing *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] 3 S.C.R. 388 ("*Pickles*") and *Barbour v. University of British Columbia*, [2009] B.C.J. No. 617 (S.C.) ("*Barbour*"), the defendants assert that a statutorily-created corporation with a public purpose has only those powers which are expressly or impliedly granted to it by that statute. As ss. 2(2) and 2(3) of the *Ontario Colleges of Applied Arts and Technology Act, 2002*, S.O. 2002, c. 8, Sch. F. ("*OCAATA*") limits the objects of colleges to education and training related activities, the defendants claim that Fanshawe is not statutorily authorized to take on the unique fiduciary duties associated with being a representative plaintiff. The relevant sections of the *OCAATA* read:

> 2(2) The objects of the colleges are to offer a comprehensive program of career-oriented, post-secondary education and training to assist individuals

> in finding and keeping employment, to meet the needs of employers and the changing work environment and to support the economic and social development of their local and diverse communities.
>
> 2(3) In carrying out its objects, a college may undertake a range of education-related and training-related activities, including but not limited to,
>
> (a) entering into partnerships with business, industry and other educational institutions;
>
> (b) offering its courses in the French language where the college is authorized to do so by regulation;
>
> (c) adult vocational education and training;
>
> (d) basic skills and literacy training;
>
> (e) apprenticeship in-school training; and
>
> (f) applied research.

[70] In response to this assertion, the plaintiff reviews the *OCAATA* in further detail. Section 2(1.1) of the Act establishes Fanshawe as a corporation without share capital. Section 274 of the Ontario *Corporations Act*, R.S.O. 1990, c. C.38 ("*OCA*") deems corporations to have the power of natural persons:

> A corporation, *unless otherwise expressly provided in the Act or instrument creating it,* has and shall be deemed to have had from its creation the capacity of a natural person and may exercise its powers beyond the boundaries of Ontario to the extent to which the laws in force where the powers are sought to be exercises permit, and may accept extra-provincial powers and rights. [Emphasis added]

[71] Section 1 of the *OCA* defines "corporation" to include corporations with or without share capital. Nothing in the *OCAATA* expressly provides that a corporation created by that statute does not have the capacity of a natural person.

[72] The plaintiff distinguishes the jurisprudence cited by the defendants, arguing that in *Pickles*, *supra* and *Barbour*, *supra*, the enacting legislation preserved the doctrine of *ultra vires*.

[73] The defendants state that s. 2(3) of the *OCAATA* expressly limits the means by which Fanshawe may pursue its objects to "education related and training related activities."

[74] In this regard, I find that the defendants have overstated their position. Section 2(3) of the *OCAATA* details activities which a college "may" undertake but to which a college is not limited. I also note that the purchase of the LCD Products by Fanshawe was in pursuit of education and training-related activities. If Fanshawe overpaid for such equipment, it would be within its mandate to seek repayment of such an overcharge.

[75] The defendants also suggest that Fanshawe has not received the necessary authorization from its Board of Governors to act as a representative plaintiff in the present matter. As per *Caribbean Cultural Committee v. Toronto (City)*, [2002] O.J. No. 2022 (S.C.J.), a corporation must obtain proper authority to commence a legal proceeding by a resolution of its Board of Governors. The defendants state that Fanshawe has failed to demonstrate that it has received such authorization.

[76] In response, the plaintiff asserts that virtually all authority has been delegated by the Board of Governors of Fanshawe College to its President, Howard Rundle, who was involved in and authorized the decision to pursue the present litigation. The defendants have not provided any evidence to contradict the plaintiff in that regard. In any event, the plaintiff states, the president's decision is binding on Fanshawe. Should it be determined that he had acted under improper authority, this would be entirely an internal matter. I agree.

[77] I find that Fanshawe College has proceeded with the necessary statutory authority to commence this action as a representative plaintiff.

Adequate and Fair Representation of Class Interests

[78] The relevant considerations under this part of the *CPA* were summarized by McLachlan C.J.C. in *WCSC*, *supra* at para. 41:

> In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class...

[79] The defendants assert that Fanshawe College cannot act as a representative plaintiff, as it has no valid cause of action against the defendants. The basis for this claim is the assertion that Fanshawe cannot prove it suffered a loss. They state that Fanshawe would have passed on any alleged overcharge as a retail mark-up or as student course fees. Citing *Bisaillion v. Concordia University*, [2006] 1 S.C.R. 666 at para. 17, the defendants assert that in order to act as a representative plaintiff, a party must have a cause of action against each defendant and that Fanshawe's inability to demonstrate liability leaves it without a cause of action against the defendants. In response, Fanshawe submits that approximately 70% of its LCD Product purchases were for internal use. In my view, there is no evidentiary basis to support the position advanced by the defendants.

Production of a Workable Litigation and Notification Plan

[80] The plaintiff has produced such a plan. The defendants do not dispute the workability of the plaintiff's litigation plan.

Are there Conflicts of Interest on the Common Issues?

[81] The defendants assert that as Fanshawe is an indirect purchaser, it has interests in conflict with direct purchasers on the issue of pass-through. They state that this conflict is exacerbated by the inclusion of Panel purchasers in the proposed class definition, since Fanshawe did not purchase any LCD Panels. In that regard, I am guided by and accept the view of Rady J. in *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2009] O.J. No. 4021 at para. 158:

> I agree with the defendants' submission that there may be a conflict between the direct and indirect purchasers arising from the impact of passing-on. I am not persuaded, however, that this disqualifies them from acting in a representative capacity. Plaintiff's counsel recognize the issue and certainly when settlement was achieved with the other defendants, steps were taken to ensure that any conflict between the two groups was resolved.

[82] As many of the LCD purchases made by Fanshawe were apparently for internal use, I find that there is some basis in fact to believe that Fanshawe suffered a loss and has a cause of action against the defendants.

[83] The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class... See *WCSC, supra,* at para. 41.

[84] I am satisfied that Fanshawe College meets these criteria.

Conclusion

[85] For the reasons noted, there shall be an order certifying this action as a class proceeding pursuant to the *CPA.*

[86] If the parties are unable to agree on the costs of this motion, I may be spoken to within 45 days.

Justice W. U. Tausendfreund

Released: May 26, 2011