CITATION: Crosslink v. BASF Canada, 2014 ONSC 4529
COURT FILE NO.: 50305 CP
DATE: 2014/09/05

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Crosslink Technology Inc. (Plaintiff)

- and -

BASF Canada, BASF Corporation, BASF A.G. Bayer Inc., Bayer A.G., Bayer Material Science LLC, Bayer Corporation, Dow Chemical Company, Dow Chemical Canada Inc., Huntsman International LLC, Lyondell Chemical Company, Rhodia, Rhodia Inc., and Rhodia Canada Inc. (Defendants)

BEFORE: Justice A. J. Goodman

COUNSEL: Charles M. Wright, & Linda Visser, for the plaintiff

Dana M. Peebles, for the defendants Dow Chemical Company & Dow Chemical Canada Inc.

HEARD: July 30, 2014

ENDORSEMENT

[1] This is a motion brought by the moving party defendants seeking leave to appeal a certification decision to the Divisional Court.

[2] On March 7, 2014, Rady J. granted the plaintiff's, Crosslink Technologies, ("Crosslink") motion for an order certifying the proceedings as a class action against the defendants Dow Chemical Company and Dow Chemical Canada Inc. ("Dow")

Background

[3] Crosslink is an Ontario corporation that purchased certain defined chemical products in its business. Dow is a major international corporation that manufactures and distributes various chemicals and other products

[4] This action relates to an alleged price-fixing conspiracy in the market for polyether polyol products. Polyether polyol products are chemical products used in the manufacturing of polyurethanes. Polyurethanes are used in a variety of applications.

[5] Crosslink alleges a conspiracy by Dow to control the sale of products in Canada between 1999 to 2004 (the Class Period), Crosslink alleges that the defendants unlawfully conspired to, and did, fix, increase, and/or maintain prices in the market for polyether polyol products in North America. Crosslink alleges that the defendants are liable for tortious conspiracy and pursuant to s. 36 and 45 of the *Competition Act*.

[6] Class proceedings have been commenced in the United States regarding alleged price-fixing in the market for polyether polyols products. The U.S. proceedings were consolidated through the multi-district litigation panel and the consolidated action was heard in the District of Kansas. The action has been resolved with all defendants with the exception of Dow.

Positions of the Parties

[7] Dow has narrowed their submissions for leave to appeal to three points:

#1. The pleadings in this cause of action – conspiracy – is a generic outline, devoid of a single material fact, and so failed the s. 5(1)(a) standard.

#2. The motions judge failed to refer to any evidence in certifying the common issues regarding liability – which is both an error of process, and a substantive error, and thus, failed to address the s. 5(1)(c) criteria; and

#3. The evidence of the plaintiff's economist was inadmissible because he lacked the necessary expertise to give an opinion on the subject industry at all.

[8] At the time the plaintiff filed its certification records, only Bayer had settled and the plaintiff's motion to intervene in the U.S. litigation for the purpose of getting access to documents. As it stands, nearly four years have passed since the plaintiff filed its certification records in August 2010.

[9] Between issuing its claim in 2006, and arguing the certification motion in 2012, the plaintiff settled with twelve of the alleged defendant conspirators, giving it exceptional access to the internal emails, confidential pricing and sales data. In addition, the plaintiff obtained access to extensive witness depositions and defendant productions in the U.S. products class action.

[10] Nevertheless, Dow submits that the plaintiff pleaded no material facts in its 2006 statement of claim of the alleged conspiracy – it did not identify any persons, meetings or acts, or agreed terms, prices or transactions. The claim is literally a template for alleging any conspiracy; and the plaintiff

filed no evidence in its 2012 motion record supportive of any material facts of the existence, operation or effect of any conspiracy amongst the defendants.

[11] In sum, Dow submits that Crosslink has simply lumped together all of the unidentified persons and failed to link any specific conspirator at Dow to any specific act or omission. Dow says that Crosslink has failed to provide the court with an evidentiary foundation to support its proposed common issues as to conspiracy as there was no evidence before the motions judge of the existence, operation or effect of a conspiracy. More importantly, Dow says that the motions judge failed to address or consider the s. 5(1)(c) criteria and whether there was sufficient or any evidence to support the certification.

[12] Crosslink submits that Rady J. certified a national class consisting of persons who purchased polyether polyols and Dow seeks leave to appeal on three grounds, which have no merit. First, Dow asserts Rady J. erred in holding that the cause of action requirement was met and argues that the plaintiff did not plead adequate material facts. To the contrary, Crosslink says the statement of claim meets the requirements for a proper plea of conspiracy. The statement of claim sets out the participants in the conspiracy, the agreement to conspire, the purpose of the conspiracy, the overt acts undertaken in furtherance of the conspiracy, and the injury sustained by the plaintiff and other class members as a result of the conspiracy.

[13] Crosslink submits that recognizing the secretive nature of price-fixing conspiracies, the courts have not required particulars of specific meetings dates, locations, participants, etc. This information usually would be in the sole hands of the conspirators, and requiring such particulars would be "oppressive and unfair" to plaintiffs.

[14] Further, Crosslink disagrees with Dow's argument that Rady J. erred in certifying the common issues relating to liability without reviewing any fact evidence going to whether there was a conspiracy. This argument is premised on a fundamental misconception of the nature of the certification motion. Crosslink submits that at the certification stage, the question is whether there is some basis in fact that the certification requirements (excluding the cause of action requirement) are met.

Legal principles

[15] An appeal from an interlocutory order of a judge of the Superior Court of Justice lies to the Divisional Court with leave.

[16] *Rule* 62.02 (4) provides that leave to appeal shall not be granted unless:

> A. there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
>
> B. there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[17] Under *Rule* 62.02(4)(a), the authorities postulate that an exercise of discretion which has led to a different result because of different circumstances does not meet the requirement for a "conflicting decision". While the conditions under *Rule* 62.02(4)(b) are conjunctive, the judge hearing the application must have good reason to doubt the correctness of the decision and must also be satisfied that the matters involved are of such general importance that leave should be granted: *Greslik v. Ontario Legal Aid Plan of the Law Society of Upper Canada*, 1988 O.J. No. 525 (Div.Ct.) at para. 7. In dealing with the correctness branch, the threshold for this prong of the test is that the court must be satisfied that the correctness of the order is open to very serious debate: *Ash v. Lloyd's Corporation* (1992), O.J. No. 894 (Gen.Div.), as cited in *Judson v. Mitchele*, 2011 ONSC 6004, (CanLII) at para. 15. See also *Brownhall v. Canada (Ministry of National Defence)*, 2006 CanLII 7505 (Sup. Ct.) at para. 30. Leave may be granted even if the decision of the court is very persuasive.

[18] In determining whether there is a good reason to doubt the correctness of the decision, it is not necessary for the moving party to convince the court that the decision it seeks to appeal from is wrong or probably wrong. The language of the provision "makes clear" the legislature's intent to "discourage the appeal of interim orders except in extraordinary circumstances." Some Ontario courts have described the test for leave to appeal has been described as "rigorous" or "onerous". The standard of review for errors of law is that of correctness and for errors of mixed fact and law is whether there is a palpable and overriding error.

[19] Justice Epstein (as she then was) explained the test for review where there was a dispute about the sufficiency of reasons, (albeit under the guise of *Rule* 20), in *Vine Hotels Inc. v. Frumcor Investments Ltd.* [2003] O.J. No. 4768, at paras. 7 and 8:

> However, the reader should not be left in a position of having to speculate about whether proper principles were applied, particularly in a motion for summary judgment where jurisprudence has developed specific principles that must be applied to the test under that rule. When a judge acts without reasons as in this case, with reasons that do not disclose the analysis, the reader cannot know whether these principles were applied and were applied properly. In such a case there must necessarily be doubt about the correctness of the decision and therefore the first part of the test under rule 62.02(4)(b) has been made out.
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> With respect to the second branch of the test there can be little doubt about the general importance of providing reasons sufficient to allow the parties to understand the principles the judge found to be applicable and how those principles were applied. In the words of Borins J.A. in Smyth v. Waterfall et al. [2000] 50 O.R. (3d) 481 (O.A.C.), 'The parties are entitled to know why the court reached its decision. Indeed, a failure to provide a reasoned decision tends to undermine confidence in the administration of justice as the absence of reasons may give the appearance of an arbitrary decision, particularly in the eyes of the unsuccessful party' Justice Borins went on to observe that the absence of reason makes appellate review difficult and in some circumstances may require a new trial or the rehearing of the motion or application.

[20] In *Diamond Auto Collision Inc. v. Economical Insurance Group*, 2007 ONCA 487, Weiler J.A. also addressed the standard for adequacy of judicial reasons at paras. 10 and 11:

> The standard for measuring the adequacy of reasons is derived from the decision of the Supreme court of Canada in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 162 C.C.C. (3d) 298 (S.C.C.). Its ratio is equally applicable, with necessary modifications, in the civil context: *Canadian Broadcasting Corp. Pension Plan v. BF Realty Holdings Ltd.* (2002), 214 D.L.R. (4th) 121 (Ont. C.A.)
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> In *Sheppard,* Binnie J. described the three functions of reasons for judgment at the trial level at para. 24. They are: 1) explaining to the losing party why he or she lost; 2) enabling informed consideration as to whether to appeal; and 3) enabling interested members of the public to see whether justice has been done. A

shorthand way of describing reasons that fulfill these functional requirements is to say that the reasons permit meaningful appellate review.

Analysis

[21] A decision by a certification judge "is entitled to substantial deference." Certification judges have a "specialized expertise" and "extensive factual knowledge of the proceedings by virtue of their case management function."

[22] Indeed, I cannot help but recognize that Rady J. is an experienced jurist in class proceedings with significant specialized expertise in these types of complex actions. That being said, and while I owe deference to Rady J., I have not abandoned the legal analysis and duties required of me as a single judge of the Superior Court in my consideration of rule 62.02.

[23] It is clear that a certification decision "often involve a careful balancing of competing interests and delicate judgment calls by judges who have developed an expertise in class action proceedings." Any intervention by appellate courts at the certification stage "should be limited to matters of general principle". The question on leave to appeal "is not whether a different judge may have reached a different conclusion on the certification motion."

[24] Dow urges this court to find that the motions judge did not exercise its "gatekeeper" role, and failed to vigilantly assess the specific case before it. As such, the cursory Reasons on each of these three submissions are "open to serious debate", in that; the plaintiff's pleading was fatally deficient; the plaintiff's evidentiary record was fatally weak; and, the plaintiff's expert was not properly qualified.

[25] There is no purpose in now reciting all of the details of the record before Rady J. because the thrust of this motion for leave to appeal on this point is not that the motions judge assessed the evidence unfairly or inaccurately; rather, the point is that the reasons do not show that the motions judge assessed the fact evidence at all.

[26] It appears that there was evidence before the court as to the operation of the market for products during the Class Period, from five witnesses (the plaintiff's principal, the Bayer sales executive, and three senior Dow sales representatives). Justice Rady had testimony available from five knowledgeable witnesses (including the cross-examination transcript of the principal of the plaintiff) about product sales during the Class Period in

Canada. Opinions were offered, including that the industry was competitive, and that there was no pattern of co-ordinated or successful price increased for products (to the point where the defendant Bayer actually lost $15.6 million in business to competitors while trying to increase prices during the Class Period).

[27] Dow submitted that this claim is devoid of particulars; that the description of the alleged conspiracy is completely generic; that the plaintiff does not specify any agreement, or actionable acts or omissions, and that the pleading cannot meet the scrutiny which s. 5(1)(a) required the motions judge to apply. Dow appears to seek a detailed description of how the conspiracy operated, where and when the meetings took place, who attended the meetings and so forth. I agree with Crosslink that this level of particularity would set a virtually impossible standard for plaintiffs to meet in a price-fixing conspiracy case. Price-fixing conspiracies are secretive in nature, with the details of the conspiracy largely in the hands of the conspirators.

[28] Indeed, in acknowledging this issue, Rady J. reproduced the paragraphs of the statement of claim describing the alleged conspiracy, and stated at paras. 76 and 77 as follows:

> I tend to agree with the defendants that the pleading is somewhat sparse in detail but, in my view, sufficient facts are alleged to ground the cause of action in conspiracy. ... It must be remembered that a certification hearing occurs before a statement of defence has been (usually) delivered and before documentary discovery. I recognize that in this case, the plaintiff has had a form of documentary discovery. I recognize that in this case, the plaintiff has had a form of documentary discovery by reason of the cooperation obligations of the settling defendants. I would have thought, however, that the production provided by the settling defendants would be the evidence of which the plaintiffs intend to prove its claim. The pleading of evidence is improper.
>
> In this case, there is a description of the parties and their relationship; the agreement by the defendants to conspire; the purpose of the conspiracy; the overt acts done to further the conspiracy;

[29] At paras. 78 and 79., Rady J. held:

> Furthermore, *Hollick, supra,* is quite clear that the evidence filed on a certification motion is to be confined to the certification

> criteria. The Ontario Court of Appeal affirmed this direction in *McCracken v. Canadian National Railway*, [2010] O.J. No. 2884 (C.A.). The court made this observation:
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> ...the "some basis in fact" test does not apply to the first criterion in s. 5(1)(a) that the pleadings disclose a cause of action. This criterion does not require the plaintiff to lead evidence showing a basis in fact for the allegations in the pleadings: see *Hollick*, at para. 25. The pleadings must contain sufficient factual allegations to establish the necessary elements of the cause of action asserted. However, unless the allegation of fact are patently ridiculous or incapable of proof, the facts must be accepted as pleaded for the purpose of determining if the plaintiff has stated a viable cause of action.

[30] What Dow here seems to invite is a preliminary merits assessment, which was squarely rejected in *Hollick,* and in decisions such as *Lambert v. Guidant Corp.*, [2009] O.J. No. 1910 (S.C.J.); aff'd [2009] O.J. No. 4464 (Div.Ct.) in which Cullity J. stated:

> It was repeatedly submitted by defendants' counsel that decisions certifying proceedings must have an "air of reality". To the extent that this means that the statutory requirements must be read and applied in the light of the purpose objectives of the legislation, it is truism. To the extent, however, that references to an air of reality are intended to introduce a preliminary merits test – disguised or otherwise – they are inconsistent with the analysis in *Hollick* and the significance that McLachlin C.J. attributed to the rejection of the views of the Ontario Law Reform Commission. In its report released in 1982, the Commission was firmly of the opinion that a plaintiff seeking certification should have the burden of establishing that the claims advanced have "substantive adequacy" and apparent validity. In the unanimous opinion of the ember of the commission, this would be required in order to eliminate the potential use of the class action procedure to blackmail defendants into agreeing to settle unmeritorious claims. The possibility that such claims could be excluded by a requirement that the pleading disclosed a cause of action was categorically rejected.

[31] Justice Rady noted that the certification hearing occurs before documentary discovery. She recognized that the plaintiff had received evidence on a cooperative basis from settled defendants, but observed that the productions provided as part of the cooperation would be the

evidence by which the plaintiff would prove its claim and that pleading evidence is improper.

[32] Overall, I see no merit with Dow's argument with regards to s. 5(1)(a). In fact, during the course of oral argument, counsel did not press this point.

[33] There is really one fundamental issue. Dow argues that Crosslink advanced only one core allegation of actionable misconduct: an agreement amongst the named defendant producers (and unnamed others) to control the sale of certain products in Canada. In effect, the core question remains is whether Crosslink filed adequate evidence to support the common issues on liability, and did the motions judge adequately consider that record in certifying conspiracy as a common issue?

[34] As Winkler C.J.O. explained in *Fulawka v. Bank of Nova Scotia,* 2012 ONCA 443, the plaintiff has the onus under s. 5(1)(c) to file affidavit evidence capable of establishing conspiracy as a proper common issue:

> While the evidentiary basis for establishing the existence of a common issue is not as high as proof on a balance of probabilities, there must nonetheless be some evidentiary basis indicating that *a common issue exists* beyond a bare assertion in the pleadings. To be clear, this is simply the *Hollick* standard of "some basis in fact". [Emphasis added.]

[35] I pause to note as indicted by the emphasized portion, Winkler C.J.O's statement that the evidentiary basis required in the s. 5(1)(c) context relates to evidence of there being a common issue and not evidence that the issue has merit or is likely to be resolved in the plaintiff's favour.

[36] Dow argues that there was no evidence that the Dow defendants agreed to work with any other manufacturer to control the sale of products, or that any product purchased at any time by any Class Member from any defendant was sold on any terms dictated by any conspiracy. Dow submits in their factum in the court below that "if successful, this motion would define the low-water mark for evidentiary standard for conspiracy certification motions in Canada".

[37] It seems to me that Rady J. certainly acknowledged that this issue – the evidentiary record – was the focal point of the Dow's argument. At para. 14 Her Honour writes:

> The defendants submit ... that the certification record contains no evidence of any material facts of a conspiracy among the defendants. In particular, they point out that the plaintiff has settled the case with the other defendants and a term of the settlement included their cooperation in supplying evidence supporting the conspiracy claim. Those defendants agreed to produce transactional data for the sales of polyether polyols, price announcements and documents reflecting communications between the defendants regarding the prices at which the product would be sold. The defendants point out that none of that evidence has been produced by the plaintiff in support of its motion for certification, which they say fatally undermines the request for certification. Whether it is necessary to lead such evidence will be the subject of further comment below.

[38] Justice Rady then dispensed with any obligation to review evidence in determining the first two certification criterion, as follows, including para. 76.

> - under s. 5(1)(a), evidence is (of course) not relevant
>
> I tend to agree with the defendants that the pleading is somewhat sparse in detail but, in my view, sufficient facts are alleged to ground the cause of action in conspiracy. ... I recognize that in this case, the plaintiff has had a form of documentary discovery by reason of the cooperation obligations of the settling defendants. I would have thought, however, that the production provided by the settling defendants would be the evidence by which the plaintiffs intend to prove its claim. The pleading of evidence is improper.
>
> - under s. 5(1)(b), it was also not necessary, according to the judge, for the plaintiff to file evidence to prove that two or more persons wished to participate in this case, or to file evidence to prove the class period dates, or to file evidence of damage to every member of the class, in order to establish an identifiable class.

[39] That brought the motions judge to consider s. 5(1)(c) – the proposed common issues. Justice Rady listed those issues (para. 104), cited the applicable legal principles (para. 105), and then summarized Dow's position at para. 106:

> The defendants submit that the expert evidence setting out the proposed methodology [to calculate damages] is inadmissible and in any event is fatally flawed. They also assert that the failure to file evidence in support of its pleading inevitably means [the plaintiff] cannot fulfill the s. 5(1)(c) test.

[40] Justice Rady reviewed the expert evidence issue (in paras. 107-110). The nub of Dow's complaint arises from the submission that the motions judge then provided the following (incomplete) sentence at para. 111 as the *entire* ruling on the defendants' argument that no sufficient foundation existed to satisfy the requirements of s. 5(1)(c):

> The defendants' contention that the plaintiff's failure to file evidence in support of its pleading [sic] has already been discussed above.

[41] Accordingly, Dow argues that the motions judge, having stated in para. 14 of the reasons that she would make "further comment below" on the Dow's assertion that the evidentiary record could not satisfy the requirements of s. 5(1)(c), then dismissed that contention in para. 111 as "already discussed above". Dow says that there is no "comment" or "discuss[ion]" between paras. 14 and 111 of the reasons about the fact evidence in that regard. Dow submits that if the motions judge was saying that her ruling in para. 76 – that the plaintiff was not required to plead evidence to satisfy s. 5(1(a) – also meant that Crosslink was not required to file evidence to support its proposed common issues under s. 5(1)(c), which is a fundamental error in law.

[42] A failure by the motions judge to provide any assessment of the evidence is a reversible error, and is plainly in conflict with other class action decisions. It is absolutely clear, as set out below, that the court must decide whether there is sufficient evidence to satisfy the certification criteria in s. 5 of the legislation.

[43] Paragraph 111 of Rady J.'s Reasons leaves open the question as to whether she reviewed and considered the evidence filed at all in ruling on s. 5(1)(c). Dow submits that Her Honour did not explain her decision to disregard extensive evidence which weighed against the existence or operation of any product price-fixing agreement in Canada. However, the impugned paragraphs cannot be read in isolation.

[44] In *Pro-Sys Consultants Ltd. v. Micrososft Corp.*, 2013 SCC 57, in discussion at paras. 99 and 100, the court held that *Hollick* asks not whether there is some basis in fact for the claim itself, but rather whether

there is some basis in fact which established each of the individual certification requirements. The Supreme Court stated that "Evidence that the acts alleged actually occurred is not required." Rather, the factual evidence requires at the certification stage "goes only to establishing whether these questions are common to all of the class members." The Supreme Court postulates that the certification stage does not involve an assessment of the merits of the claim. It seems to me that Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at certification. The outcome of the certification motion is not predictive of the outcome of the common issues at trial.

[45] Here, Dow argues that Crosslink raised only a "speculative assertion" as to a conspiracy, given that the full record showed the product industry to be competitive during the Class Period. The decision of the motions judge to certify the common issues as to conspiracy both conflicts with the cases recognizing that a deficient record is fatal, and raises serious doubt as to viability of the order below.

[46] It is not necessary that the predominant purpose of the defendants' conduct is to cause injury to the plaintiff. It is sufficient that there is a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. A judge is not required to address every argument that a party raises and the failure to do so does not render the decision open to serious debate. A judge is entitled to emphasize the particular issues and evidence that influenced his/her decision.

[47] Justice Rady found that sufficient facts were alleged to ground the cause of action in conspiracy: there was a description of the parties and their relationship, the agreement by defendants to conspire, the purpose of the conspiracy, the overt acts done to further the conspiracy, and the injury caused as a consequence.

[48] Justice Rady's review and considerations of the jurisprudence at para. 34 of her Reasons are instructive.

> The court also concluded that the remaining certification requirements were satisfied. The class representative must show some basis in fact for each of the certification requirements set out in the provincial class action legislation, other than the requirement that the pleadings disclose a cause of action. The standard does not require proof on a balance of probabilities. It does not involve an assessment of the merits of the claim nor is it intended to be a pronouncement on the viability or strength of the

> action. Rather, it focuses on the form of the action to determine whether it can appropriately go forward as a class proceeding. Further, each case must be decided on its own facts. There must be a sufficient factual basis to satisfy the motions judge that the conditions for certification have been met so that the claim can proceed on a class basis without foundering at the merits stage.

[49] Dow criticizes Crosslink for not filing cooperation evidence received from settle defendants, U.S. discovery documents, evidence of criminal proceedings, or evidence from a whistleblower. They assert that the plaintiff "could not find (or file) evidence to support its common issues." Dow also complains that Rady J. affirmed the issues relating to the existence and scope of the conspiracy without any comment or discussion about the fact evidence for and against the existence of a conspiracy. This implies that Justice Rady did not consider their arguments on this point.

[50] To the contrary, in my opinion, Rady J. considered Dow's argument and the propriety of assessing such evidence and, relying on appellate authority, declined to do so. Her Honour found that the jurisprudence supports that evidence filed on certification is to be constrained. Justice Rady held that the "some basis in fact" test does "not require the plaintiff to lead evidence showing a basis in fact for the allegations in the pleadings".

[51] From my review, it seems that various courts have held that questions about the existence, scope and nature of an alleged conspiracy depend solely on the conduct of the defendants. These questions can be determined without reference to the individual circumstances of class members. None of the cases certifying conspiracy as a common issue have required evidence establishing that there was, in fact, a conspiracy. Evidence of a conspiracy, *per se*, is not relevant at the certification stage.

[52] The question is not whether there is some basis in fact for the allegations underlying the proposed common issues. As to the procedural nature of this type of hearing, the certification motion is not about the merits. Questions relating to the existence and scope of the conspiracy depend solely on the conduct of the Dow defendants and their co-conspirators, and are therefore properly certified as common issues.

[53] Justice Rady acknowledged the requirement that some evidence is required in support of certification criteria other than s. 5 (1)(a). Inherent in that analysis is a recognition that the moving plaintiff is required to proffer some evidence to support the alleged s. 5 (1)(c) requirement. To that end, I find para. 35 of Her Honour's Reasons to be germane:

> The applications judge's finding that the claim raised common issues is entitled to deference. *In order to establish commonality, evidence that the acts alleged actually occurred is not required.* Rather, the factual evidence required at this stage goes only to establish *whether the questions are common* to all the class members. [Emphasis added.]

[54] This expressly recognizes that evidence required to meet the threshold in s. 5(1)(c) is not evidence that events actually occurred but evidence that is related to whether questions purported to be common issues are common to the class. Here, proposed common issues included not only questions relating to alleged infliction of common damages, but alleged common issues as to whether Dow engaged in wrongful conduct giving rise to liability. In her reasons, Rady J. appeared to focus expressly on need for sufficient evidence to address suggested common issues relating to damages, and why some evidence of plausible methodology would suffice.

[55] In that regard, Rady J. confined her express s. 5(1)(c) "sufficiency of evidence" inquiry, ("is there some evidence" to support the existence of common issues) to those suggested damages without any express analysis of whether the requirement was satisfied in relation to proposed liability of common issues.

[56] It may be accurate to say that Rady J. did not expressly focus on the existence of a "sufficient evidentiary basis" for the existence of common liability issues as well as the existence of common damages issues, but it is neither fair nor correct to conclude that she did not expressly consider and address such matters at all in the context of s. 5(1)(c). Insofar as Dow suggests that Rady J. failed to consider the sufficiency of evidence relating to common liability issues, it seems to me that Dow's arguments inherently disregard the fundamental distinction between the need for sufficiency of evidence to satisfy the court an issue is common and suggestion that the evidence is inadequate to intimate that the issues have merit.

[57] In my view, the limited questions as to the commonality of the proposed liability issues was inherent and self-evident, which understandably explains why Rady J.'s s. 5(1)(c) focus was directed towards the more complicated and vexing question - as exhibited by the evolving jurisprudence - as to whether proposed questions relating to damages can be common to the class in any workable manner.

[58] Viewed in the context, and notwithstanding Mr. Peebles' very able and persuasive argument, I do not think Rady J.'s failure to embark on an express or extended consideration of evidence relating to the proposed

common liability issues was a failing that meets the granting of leave to appeal.

Disposition:

[59] I do not agree with the defendants that there are conflicting decisions of this court. I agree with the plaintiff that the defendants have not met the test in subrule 62.02(4)(a). Moreover, for the aforementioned reasons, I find that Dow has not met the test in subrule 62.02(4)(b). In my view, there is no good reason to doubt the correctness of the order in question. Moreover, in my view the proposed appeal does not involve matters of such importance beyond the parties that leave should be granted.

[60] Dow's motion for leave to appeal to the Divisional Court is dismissed.

[61] If the parties cannot agree on the issue of costs, I will consider brief written submissions. These cost memoranda shall not exceed three pages in length, (not including any bill of costs or offers to settle). Crosslink shall file its costs submissions within 10 days of the date of this endorsement. Dow shall file its costs submissions within 10 days of the receipt of the respondents' materials. Crosslink may file a brief reply within five days thereafter.

Justice A. J. Goodman

Date: September 5, 2014