

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ALFRESH BEVERAGES CANADA CORP. (Plaintiff)

- and -

HOECHST AG, EASTMAN CHEMICAL COMPANY INC.,
DAICEL CHEMICAL INDUSTRIES, LTD, UENO FINE
CHEMICALS INDUSTRY, LTD., CHISSO CORPORATION,
NIPPON GOHSEI, and CHEMINOVA AGRO A/S. (Defendants)

BEFORE: CUMMING J.

COUNSEL: *C. Scott Ritchie* and *Charles M. Wright*, for the Plaintiff

Elliott Kohlers, for Hoechst AG

Glenn Zakaib, for Daicel Chemical Industries, Ltd.

David Hamer, for Ueno Fine Chemicals Industry, Ltd.

Glenn Leslie and *Chris Hersh*, for Eastman Chemical Company Inc.

Randy Hughes, for Nippon Gohsei

PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992

ENDORSEMENT

The Motion

[1] The plaintiff moves for final approval of the settlement in this class proceeding brought pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA") with respect to five of the defendants, being Hoechst AG, Eastman Chemical Company Inc., Daicel Chemical Industries, Ltd., Ueno Fine Chemicals Industry, Ltd. and Nippon Gohsei. Settlement agreements dated October 5, 2001 and November 21, 2001 were entered into. The action was conditionally certified on November 27, 2001, on consent by these five defendants as against them, with preliminary

approval given to the settlements. The requisite notice was then published to the class pursuant to the court order of that date.

[2] Class actions were also commenced in British Columbia (*Peter Mura v. Hoechst AG et al.*) and Quebec (*L'Association Cooperative D'Economie Familiale Du Nord de Montreal et Raymond Mailhot v. Hoechst AG et al.*). The Ontario class action and settlement includes all class members in Canada other than the residents of those two provinces. However, the amount of \$209,907.00 in the settlement fund established in respect of the class proceeding at hand is allocated to resolve the Quebec proceeding in so far as it relates to consumers in that province. The settlements in respect of the three class actions cover all class members in Canada. Court approvals in the other two provinces are pending.

The Ontario class action

[3] The plaintiff commenced this proceeding March 28, 2000, alleging that the defendants conspired to fix the prices and allocate the market share of sorbates between 1979 and 1996. Sorbates (including potassium sorbate and sorbic acid) are chemical preservatives used primarily as a mould inhibitor in high moisture and sugar foods such as, for example, dairy and bakery products.

[4] The settling defendants other than Nippon Gohsei pleaded guilty to violations of s. 45 (1) (c) of the *Competition Act* R.S.C. 1985, c.19 (2nd Supp.). These four defendants had total Canadian sales during the period of the conspiracy of some \$23,900,000.00 The settling defendant, Nippon Gohsei, had sales of only about \$243,000.00.

[5] The plaintiff sues for damages pursuant to s. 36 of the *Competition Act* as a consequence of the defendants' actions allegedly undertaken in contravention of s. 45 of that *Act*.

Certification and settlement

[6] In my view, the criteria for certification required by s. 5 (1) of the *CPA* are met for the purposes of completing the disposition of this proceeding in respect of the settling defendants.

[7] The action has involved risks of a procedural and substantive nature for the plaintiff. For example, there may have been motions contesting jurisdiction by the foreign defendants. There is a risk in respect of proving any damages and of achieving a result whereby damages are dealt with to a large extent on an aggregate, rather than an individual, basis. To date, there is limited class action case law involving allegations of price-fixing. There is considerable uncertainty with respect to the claims of indirect purchasers involving alleged antitrust violations being advanced by means of a class proceeding. *Chadha v. Bayer* (2001), 54 O.R. (3d) 520 (Div. Ct.) at 549, leave to appeal to the Court of Appeal granted.

[8] The opt-out deadline is February 11, 2002. A deadline for objections to the settlements of January 4, 2002 was established. No opt outs have been received to date. No written objections have been received.

[9] The settling defendants have agreed to pay compensation of \$3,055,743.00 plus interest. An analogue or comparator employed by class counsel in settling is a settlement in an action involving the same products brought on behalf of direct purchasers in the United States. That settlement was based on payment of 11.2% times the defendants' sales. See *In Re Sorbates Direct Purchaser Antitrust Litigation* U.S.D.C. (Northern District of California), C98-4886, CAL. The one in the class proceeding at hand is equal to 11% of sales during the period of the alleged conspiracy.

[10] Three economists, Thomas A. Wilson, Thomas Ross, and James Brander, as expert witnesses, have provided comprehensive affidavits which review the economic uncertainties and difficulties in ascertaining damages in this alleged price-fixing conspiracy. They state that in their view the proposed settlement and distribution protocol are fair and reasonable, taking into account all the relevant circumstances.

[11] The defined "Ontario class" includes all persons other than the defendants who purchased sorbates in Canada, excluding those resident in Quebec and British Columbia, between January 1, 1979 and December 31, 1996. Thus, it is to be noted that claimants who made purchases made from sorbates producers other than the defendants are also eligible for compensation. These payments reflect the possibility that the prices of non-defendant producers may have increased as a result of the alleged price-fixing by the settling defendants. The defendants and their related entities reportedly dominated the world market for sorbates during the alleged conspiracy period. However, the distribution protocol pays a reduced amount in respect of such purchases given the problematic court action by any such class members against the settling defendants.

[12] The distribution protocol developed for this settlement follows that seen in the citric acid price-fixing class action litigation similar to the one at hand. See *Alfresh Beverages Canada Corp. v. Archer Daniels Midland Company of Canada et al.*, Endorsement and Order of Winkler J. (23 October, 2001).

[13] If a distributor or manufacturer opts out the settling defendants will receive a credit against the monies paid. The distribution protocol provides for the distribution of monies as between four different categories of class members. Class members include: "distributors", being those who purchased and resold sorbates to a further purchaser; "manufacturers", who purchased sorbates and manufactured a product of which the sorbates was a component part; "intermediaries", who purchased products which contain sorbates as a component part, and resold the same or virtually the same product to a further purchaser; and "consumers" who purchased products which contain sorbates as a component part, and consumed the product.

[14] A Distributors and Manufacturers Settlement Fund is established for entities across Canada who purchased sorbates in raw form. The payments from this fund will be made *pro rata* to all entities who file timely claims based upon verified purchases.

[15] There are significant problems in identifying possible claimants below the manufacturer level. Hence, the monies allocated to intermediaries such as wholesalers and consumers are to be paid by a *cy pres* distribution to specified not-for-profit entities, in effect as surrogates for these categories of claimants, for the general, indirect benefit of such class members. The *CPA* provides the flexibility for this approach: see ss 24 and 26.

[16] Such a settlement and payments largely serve the important policy objective of general and specific deterrence of wrongful conduct through price-fixing. That is, the private class action litigation bar functions as a regulator in the public interest for public policy objectives.

[17] Therefore, payments are made to each of the Canadian Council of Grocery Distributors and Canadian Federation of Independent Grocers for the purpose of compensating indirectly intermediaries. The Food Institute at the University of Guelph, the Consumers Association of Consumers and the Canadian Association of Food Banks will each receive one-third of the funds allocated to indirectly compensate consumers.

[18] It is proposed that Crawford Adjusters Canada administer the settlement. This firm has experience in implementing complex class action settlements. The costs of administration will be borne by the settlement fund. Any monies not distributed to manufacturers and distributors through the claims process will move over to the funds for intermediaries and consumers. Any disputes with respect to entitlement by class members are to be determined by the court.

Disposition of motion to approve settlement agreement

[19] In my view, the proposed settlement represents a reasonable compromise of what would be a complex, expensive, risky and potentially protracted litigation. The settlement benefits are substantial. In my view, and I so find, the settlement is fair, reasonable and in the best interests of class members. Accordingly, the settlement is approved as required by s. 29(2) of the *CPA*.

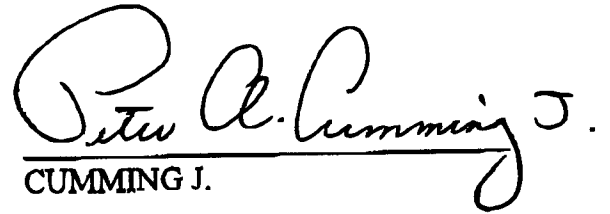
Motion to approve retainer agreement and legal fees

[20] Class counsel move for approval of their retainer agreement and their fees and disbursements. The time-based base fee is \$195,000.00 and a multiplier of three is requested. In my view, this is a reasonable amount taking into account all the circumstances. This class action is complex with attendant risks, the action and proposed resolution is novel, there is uncertainty with respect to certification in the absence of a settlement, the action was proceeded with on a contingency basis, substantial compensation has been achieved and in the absence of the class proceedings it is unlikely that there would have been any relief for class members.

Disposition

[21] Accordingly, total fees of \$585,000.00 plus G.S.T. plus disbursements of \$35,847.05 plus applicable G.S.T. are approved.

[22] An order is to issue today in accordance with this Endorsement.


CUMMING J.

January 14, 2002