

# Indirect Purchaser Price Fixing Claims— A Canadian Approach

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## 1. Introduction

The question of who can claim damages arising from price fixing conspiracies is a troublesome one. From a Canadian perspective, the US solution found in *Illinois Brick*<sup>1</sup> and *Hanover Shoe*<sup>2</sup> may appear dogmatic and inflexible.<sup>3</sup> And the *Illinois Brick* repealer statutes enacted by many US jurisdictions<sup>4</sup> seem a chaotic response which legitimizes double recovery.

What will Canadian courts do with indirect purchaser claims? The answer may lie in the January 2003 decision of the Ontario Court of Appeal in *Chadha v Bayer Inc.*,<sup>5</sup> the first attempt to certify a price fixing class action to reach an appellate court in Canada. There Canada's most influential provincial appellate court refused to certify an indirect purchaser class, but did so without embracing the black and white approach of *Illinois Brick*. Instead, it found a more nuanced and principled approach which leaves open the possibility of indirect purchaser classes in other cases.

## 2. The Chadha case

### A. The alleged cartel

The plaintiffs alleged a conspiracy by defendants who were manufacturers and distributors of iron oxide pigments used in making bricks, paving stones and other building materials. The conspiracy was said to have been in operation between 1985 and 1991, a period during which the defendants generally held more than 90 per cent of the Canadian market for iron oxide. Expert evidence filed on the class certification motion indicated that, if entirely passed through to end consumers, the cartel-related increase in the price of iron oxide pigments could raise the cost of a \$150,000 home by between \$70 and \$112.<sup>6</sup>

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<sup>1</sup> *Illinois Brick v Illinois*, 431 U.S. 720 (1977).

<sup>2</sup> *Hanover Shoe Inc v United Shoe Machinery Corp*, 392 U.S. 481 (1968).

<sup>3</sup> In these cases the US Supreme Court held, in essence, as a matter of judicial policy, that (1) defendants could not set up a "pass-on" defence (which asserts that any cartel overcharge was passed on down the distribution chain) against direct purchaser plaintiffs; (2) direct purchasers were entitled to claim all the price fixing harm suffered by anyone in the distribution chain; and (3) as a corollary, indirect purchasers could not sue.

<sup>4</sup> These statutes permit indirect purchasers to sue under state law even though direct purchasers are already entitled to sue for the entire harm under federal law.

<sup>5</sup> Released January 14, 2003, Ontario Court of Appeal Docket No.C37224.

<sup>6</sup> *Chadha v Bayer Inc.*, above, paras 5-9.

### B. *The proposed class*

When their claim was first issued, the plaintiffs' proposed class was a vertically integrated "universal" class described as follows:

"All persons in Canada...; in particular, *all persons who purchased either directly or indirectly* bricks or other construction products containing iron oxide pigment or black pigment manufactured or distributed by one or more of the Defendants (or, where applicable, their corporate predecessors), between 1985 and 1992" [*emphasis added*].<sup>7</sup>

However, prior to the certification motion, the plaintiffs revised the proposed class to exclude direct purchasers and to include only the homeowners who were the ultimate consumers of iron oxide:

"All homeowners or other end users in Canada...; in particular, *all homeowners or other end users* of bricks, interlocking or other construction products containing iron oxide pigment or black pigment manufactured or distributed [by the defendants]" [*emphasis added*].<sup>8</sup>

## 3. The test for certification

The test for certification of a class action in Ontario is essentially the same as in all other Canadian jurisdictions with modern class action rules and contains five requirements:

- (a) the formal claim must disclose a cause of action;
- (b) there must be an identifiable class;
- (c) the claims of the class must raise common issues;
- (d) a class proceeding must be the preferable procedure; and
- (e) there must be an appropriate representative plaintiff.<sup>9</sup>

## 4. The courts' analysis

### A. *The three decisions*

The proposed class was certified by the judge who heard the certification motion.<sup>10</sup> That decision was reversed by a split panel of the Ontario Divisional Court.<sup>11</sup> That decision in turn was upheld by a unanimous panel of the Ontario Court of Appeal.

<sup>7</sup> *Chadha v Bayer Inc*, above, para.6.

<sup>8</sup> *Chadha v Bayer Inc*, above, para.7.

<sup>9</sup> Class Proceedings Act, 1992, S.O. 1992, c.6, s.5(1).

<sup>10</sup> *Chadha v Bayer Inc* (1999) 45 O.R. (3d) 29 (Sup.Ct.J.).

<sup>11</sup> *Chadha v Bayer Inc* (2001) 54 O.R. (3d) 920 (Div.Ct.). The Divisional Court is an appellate division of the trial court which hears appeals from interlocutory decisions of the trial court.

### B. The key issues

At each level, the courts focused on the third and fourth elements of the certification test—commonality and preferability. As far as commonality is concerned, it was acknowledged that the question of whether there had been an agreement to fix or maintain prices was a common issue. The dispute centred on whether liability could also be a common issue and, in particular, whether harm, a prerequisite for liability, could be determined on a common basis for a class of indirect purchasers. The courts' analysis of preferability, a sort of Canadian version of the US requirement of "predominance", was then driven by their conclusions as to commonality. In other words, each court's conclusion as to whether liability could be determined on a common basis was the key factor in its conclusion as to whether or not a class proceeding was the preferable procedure for the resolution of the litigation.

### C. The Court of Appeal's approach

#### (i) Commonality

The principal issue was whether proof of loss (though not necessarily the exact amount of loss) could be a common issue. The motions judge expressly declined to follow *Illinois Brick* by barring actions by indirect purchasers. The Court of Appeal did not criticize this refusal to set general rules and to impose the US *Illinois Brick* structure on Canadian price fixing litigation. However, the Court of Appeal did criticize the motions judge for failing to take into account the complexities (discussed in *Illinois Brick*) involved in determining which participants in a given distribution chain actually bear the brunt of price fixing harm.<sup>12</sup>

The Court of Appeal went on to consider these complexities in the context of its commonality analysis. In particular, the Court noted that the economic evidence filed by the plaintiffs on the certification motion assumed, without analysis, that harm had been passed through to the end consumers.<sup>13</sup> The plaintiffs' expert, on the strength of this assumption, went on to opine as to how that harm might be quantified and allocated among the class members. As the Court pointed out, however, the plaintiffs adduced no evidence as to whether any harm at all had actually passed through to end consumers or as to how, as a matter of theory, that issue might be approached.<sup>14</sup> The absence of any evidence as to how the existence of harm might be proven on a common basis for all members of the class was fatal to the plaintiffs' attempt to have liability defined as a common issue.<sup>15</sup>

The Court of Appeal was careful, however, to note that indirect purchaser classes were not inevitably barred for lack of commonality and might, on appropriate evidence, be certified.<sup>16</sup> The Court relied heavily on the recent US decision in *In Re Linerboard Antitrust*

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<sup>12</sup> *Chadha v Bayer Inc* (Court of Appeal), above, para.43.

<sup>13</sup> *Chadha v Bayer Inc* (Court of Appeal), above, para.30.

<sup>14</sup> *Chadha v Bayer Inc* (Court of Appeal), above, paras 30-31.

<sup>15</sup> *Chadha v Bayer Inc* (Court of Appeal), above, para.52.

<sup>16</sup> *Chadha v Bayer Inc* (Court of Appeal), above, para.68.

*Litigation*<sup>17</sup> as an example of a case in which sufficient economic evidence had been adduced to justify certification. The Court of Appeal noted the expert evidence in that case on the concept of “presumed impact”, as well as the extensive empirical investigations that had actually been undertaken and the advanced economic modelling which could be prepared to establish class-wide impact.<sup>18</sup> The Court of Appeal compared the *Chadha* plaintiffs’ evidence unfavourably to that of the *Linerboard* plaintiffs, implying that the kind of evidence led by the latter might be capable of supporting the certification of an indirect class in Canada.<sup>19</sup> However, it is worth noting that the class in *Linerboard* was a direct class entitled to recover all of the alleged overcharge—it may be simpler to adduce the necessary economic evidence in respect of a direct class than an indirect class, particularly where no pass on defence is permitted.

## (ii) Preferability

Once liability was determined not to be a common issue, the question of preferability became relatively straightforward. Although the legislative test for preferability is whether or not a class proceeding would be “the preferable procedure for the resolution of the common issues”,<sup>20</sup> recent Supreme Court of Canada jurisprudence has established that preferability must be examined with respect to the resolution of the action as a whole and not just the common issues.<sup>21</sup> And while neither Ontario nor any other Canadian jurisdiction has a US style predominance requirement, the preferability test does assess whether or not the resolution of the truly common issues will move the litigation forward significantly or whether they would represent only the commencement of a large and unmanageable series of individual inquiries. In *Chadha*, the Court of Appeal determined that the complex individual inquiries required to determine whether any class member had suffered any harm, all apart from the degree of harm suffered, meant that the action would be unmanageable even though the factual issues relating to the existence of a conspiracy might be determined on a common basis.<sup>22</sup>

## 5. What *Chadha* means

The decision of the Ontario Court of Appeal in *Chadha* turned in large part on the paucity of the plaintiffs’ evidence. But it would be a mistake to assume that the decision is therefore confined to its facts—the Court’s analytical approach still establishes a number of significant general propositions for antitrust litigation in Canada. For example:

- There is no black and white resolution to the complex issues surrounding standing to bring price fixing litigation. Indirect purchasers are as entitled to bring suit as direct purchasers.

<sup>17</sup> 305, F.3d 145 (2002).

<sup>18</sup> *Chadha v Bayer Inc* (Court of Appeal), above, paras 32-39.

<sup>19</sup> *Chadha v Bayer Inc* (Court of Appeal),\* above, paras 39-40.

<sup>20</sup> Class Proceedings Act, 1992, above, s.5(1)(d).

<sup>21</sup> *Hollick v City of Toronto* [2001] 3 S.C.R. 15, paras 29-30.

<sup>22</sup> *Chadha v Bayer Inc* (Court of Appeal), above, para.56.

- The necessary implication of the status of indirect purchasers to bring suit is that price fixing harm can and must be traced to its resting place through the channels of distribution. This, in turn, means that the pass on defence is alive and well.
- Whether harm is capable of being analyzed and proved on a common basis requires sophisticated economic evidence at the certification stage. The existence of a viable approach to a common assessment of harm, rather than proof of the outcome of that approach, is what must be demonstrated. This requirement presumably attaches not only to proposed indirect classes but to proposed direct classes as well—a direct class which assumes that its members did not pass on the price fixing harm may be as doomed to failure as an indirect class which assumes that the harm was passed on.

Developments in the Canadian vitamins price fixing litigation may refine the *Chadha* analysis. In the vitamins cases,<sup>23</sup> the plaintiffs have proposed a universal class consisting of all direct and indirect purchasers and consumers of relevant vitamins during the relevant times. They first propose to establish liability and global damages generally on behalf of the class, which presumably contains everyone who suffered harm no matter what the results of any pass on analysis. They then propose to conduct proceedings to allocate those damages among the class members. Whether this approach and a universal class will solve the certification problems suffered by the partial class in *Chadha* remains to be seen.<sup>24</sup>

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<sup>23</sup> There are approximately 12 co-ordinated class actions proposed in three jurisdictions. Five proposed class actions, each covering a different collection of vitamins, are moving forward as a package first in Ontario.

<sup>24</sup> The certification motions for the Ontario vitamins class actions are currently scheduled for September 15, 2003.