

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SOUTH VANCOUVER CARD COMPANY

PLAINTIFF

AND:

**STONE CONTAINER CORP., JEFFERSON SMURFIT CORP., SMURFIT-
STONE CONTAINER CORP., SMURFIT-MBI, formerly known as
MACMILLAN BATHURST, UNION CAMP CORP., INTERNATIONAL
PAPER CO., INTERNATIONAL PAPER CANADA, INC., also known as
INTERNATIONAL PAPER LTD. – CANADA, GEORGIA PACIFIC CORP.,
GEORGIA-PACIFIC CANADA, INC., WEYERHAEUSER PAPER CO.,
WEYERHAEUSER COMPANY, WEYERHAEUSER COMPANY LIMITED,
formerly known as WEYERHAEUSER CANADA LTD., TEMPLE-INLAND
INC., INLAND PAPERBOARD AND PACKAGING, INC., GAYLORD
CONTAINER CORP., TENNECO, INC., TENNECO PACKAGING, and
PACKAGING CORPORATION OF AMERICA**

DEFENDANTS

Brought under the *Class Proceedings Act*

**WRITTEN BRIEF
CERTIFICATION AND APPROVAL OF SETTLEMENT AGREEMENTS**

PART I. NATURE OF THE MOTION

1. Subject to the approval of this Honourable Court, Ontario's Superior Court of Justice, and the Superior Court of Quebec, the Plaintiff in the within action has reached three separate settlements which will resolve all claims arising out of this action.
2. This motion is for Orders that the within action be certified as a class proceeding as against all of the Defendants, and for Orders approving the settlements as fair, reasonable, and in the best interests of the class.

PART II. SUMMARY OF FACTS

(A) Background

3. The within action was commenced on July 12, 2005. The claim alleges a conspiracy to fix, increase, and/or maintain prices for linerboard, corrugated sheets, and corrugated boxes in North America by artificially restricting supply which caused damage to the Plaintiff and others similarly situated through increased prices. Similar litigation was also commenced in Ontario and Quebec.

Amended Statement of Claim

Affidavit of Michael G. Robb sworn June 16, 2006, para. 6.

4. Linerboard is a compressed material used for the inner and outer layers of a corrugated sheet or box. Medium is the fluted inner layer of the corrugated sheet. Together, linerboard and medium are often referred to as containerboard or corrugated cardboard. The Canadian market for linerboard and corrugated cardboard products is significant. Publicly available information indicates that \$1509.6 million of corrugated cardboard boxes were consumed in Canada in 1997.

Affidavit of Michael G. Robb sworn June 16, 2006, paras. 8-9.

(B) United States Class Actions

5. The allegations in the within litigation have been the subject of significant litigation in the United States. In September 2001, the U.S. Litigation was certified as a class action on behalf of two classes of direct purchasers. The appeal court upheld the decision of the lower court to certify the action.

Affidavit of Michael G. Robb sworn June 16, 2006, para. 11.

6. The U.S. class action has now been resolved against all defendants for a combined total of approximately US\$202,572,489. The defendants paid the following amounts by way of settlement: Temple-Inland Inc. and Gaylord Container Corp - US\$7,200,000; Georgia

Pacific Corp., International Paper Co., Union Camp Corp., and Weyerhaeuser Company - US\$68,000,000; Packaging Corporation of America, Tenneco Inc., and Tenneco Packaging Inc. - US\$34,000,000; Smurfit-Stone Container Corp - US\$92,500,000. There have been a number of opt-outs from the U.S. litigation and that opt-out litigation is continuing.

Affidavit of Michael G. Robb sworn June 16, 2006, para. 12-14.

(C) The Canadian Settlements

7. The Main Settlement Agreement is dated December 1, 2005. The Temple Inland Settlement Agreement was executed on March 29, 2006, and the Stone Settlement Agreement was executed on May 25, 2006. Each agreement was signed following arms-length settlement discussions. Pursuant to the terms of the Main Settlement Agreement, the Settling Defendants agreed to pay a combined CDN\$935,528. The Settling Defendants in the Temple-Inland Settlement Agreement agreed to pay US\$20,000. The Settling Defendants in the Stone Settlement Agreement agreed to pay US\$830,000. In addition to monetary compensation, the Temple-Inland Defendants provided cooperation to the plaintiffs to assist in pursuing the litigation against other defendants who had not, as at the date of the Temple-Inland Settlement Agreement, agreed to settle.

Affidavit of Michael G. Robb sworn June 16, 2006, para. 2, Exhibits "A", "B" and "C".

8. Paragraph 4.3(2) of the Main Settlement Agreement provides for a clause referred to as a "Most Favoured Nations" clause. The result of this clause is that by virtue of the Temple-Inland Settlement Agreement, the plaintiffs will be required to refund one half of the Temple-Inland Settlement Amount, or US\$10,000 to the Settling Defendants in the Main Settlement Agreement.

Affidavit of Michael G. Robb sworn June 16, 2006, para. 17.

9. In addition, paragraph 4.3(2) may have been triggered by the Stone Settlement Agreement as well, which could have resulted in a payment to the Settling Defendants in the Main Settlement Agreement of up to US\$415,000. However, agreements were obtained whereby the Defendants' rights under paragraph 4.3(2) above were waived, except to the extent of a C\$40,000 payment to Georgia Pacific Corp, which will be made in the event that the Main and Stone Settlement Agreements are approved.

Affidavit of Michael G. Robb sworn June 16, 2006, para. 17.

10. Although no formal discovery had taken place at the time the settlements were achieved, significant information was available to Class Counsel to evaluate the merits of the settlements. In entering into these settlements, Class Counsel considered the following factors:
- (i) Total sales in Canada;
 - (ii) The Settling Defendants' respective sales in Canada;
 - (iii) Expert advice received from the firm of Nathan and Associates in Washington D.C. relating to the potential damages;
 - (iv) Settlement Agreements previously entered into in the United States, the nature of the counsel who litigated that case, the applicable law and the stage at which settlements were reached;
 - (v) The range of damages which might be proven at trial;
 - (vi) Procedural and litigation risks, including:
 - (a) The risk that the court would not certify the action;
 - (b) The risk that the court would not certify a national class;
 - (c) Procedural risks associated with multi party litigation;

- (d) The risk that the court would not agree that an aggregate damage assessment was possible, thus making the proof for individual class members onerous;
- (e) The risk that individual class members would encounter difficulties proving that damages were not passed on by them, or were passed on to them;
- (f) The risk that the court would find that there was no conspiracy, that the conspiracy entered into was ineffective, or that any illegal activity had little or no effect on prices;
- (g) The risk that the court would find that the defendants could only be held responsible for their own sales;
- (h) The risk that limitation periods had expired in some provinces; and
- (i) Even in the event that the plaintiff was successful in all phases of the litigation, plaintiff was aware that the defendants would likely file appeals in respect of multiple issues, thus resulting in a considerable delay in compensation for class members.

Affidavit of Michael G. Robb sworn June 16, 2006, para. 18.

Distribution

11. Plaintiff's counsel sought to devise a protocol to distribute the Settlement Funds which would be inexpensive to administer and apply for given the limited funds available.

Affidavit of Michael G. Robb sworn June 16, 2006, para. 20, Exhibit "M".

12. 90% of the total monies payable by the Defendants plus accrued interest, less Class Counsel Fees, Administration Expenses, and monies allocated to a *cy-près* distribution will compensate entities that purchased corrugated material directly from the Settling Defendants (excluding Smurfit-MBI) ("Fund 1"). Fund 1 will be paid out proportionally based on total value of purchases. Class Members will receive correspondence which indicates their total purchases during the Class Period. To the extent a Class Member has records which indicate additional purchases, they may be submitted.

Affidavit of Michael G. Robb sworn June 16, 2006, para. 21.

13. Under the terms of the Distribution Protocol, Class Members' purchases of linerboard will be ascribed twice the value of purchases of sheets or boxes. Linerboard constitutes approximately one half of the cost of the raw materials used in producing corrugated sheets and containers, the other portions largely being "mediums". Halving the value of box purchases will effectively only pay Class Members on the portion of the costs attributable to the linerboard component and will thereby place these two different groups of Class Members on approximately even footing.

Affidavit of Michael G. Robb sworn June 16, 2006, para. 22.

14. 10% of the total monies payable by the Defendants plus accrued interest, less Class Counsel Fees, Administration Expenses, and monies allocated to Indirect Purchasers are allocated to compensate Class Members who purchased Corrugated Products from entities other than the Settling Defendants ("Fund 2"). Given that this volume of sales will be much higher than those which are eligible for Fund 1, it is anticipated that settlements per dollar of sales will be very modest. This is a reasonable allocation because of the significant litigation risk faced by Class Members with respect to these purchases. Although there is no precedent in Canada (and Class Counsel would have argued at trial that these purchases should not be treated differently), in the United States the law is fairly clear that damages cannot be obtained with respect to these purchases.

Affidavit of Michael G. Robb sworn June 16, 2006, para. 23.

15. Given the limited funds available, it has been determined that a very rough but simple and efficient distribution methodology is appropriate. Class Members only have to swear to the fact that they are resident in Canada, had purchases of Corrugated Material of \$250,000 or more from non-Defendants for delivery in Canada during the Purchase Period, and attach some corroborating information in order to obtain a share of the fund.

Affidavit of Michael G. Robb sworn June 16, 2006, para. 25.

16. Class Members may claim from both Fund 1 and Fund 2.

Affidavit of Michael G. Robb sworn June 16, 2006, para. 26.

17. Pursuant to the terms of the Distribution Protocol, \$75,000 has been allocated to be paid out through a distribution to the Tree Canada Foundation which will be for the general benefit of Settlement Class Members to indirectly compensate Settlement Class Members who are not eligible for direct compensation.
18. Tree Canada Foundation will use the settlement monies received to planting trees on various school grounds.

Tree Canada Proposal, Exhibit "O" to the Affidavit of Michael G. Robb, sworn June 16, 2006

(D) Class Certification

(i) Causes of Action

19. The pleadings disclose a cause of action. The Plaintiff alleges that the Defendants:
- (i) contravened Part VI of the *Competition Act* giving rise to a right of damages under section 36 of the *Competition Act*,
 - (ii) are liable for the torts of conspiracy and intentional interference with economic interests; and
 - (iii) are liable for punitive damages

Affidavit of Michael G. Robb sworn June 16, 2006, para. 37.

Amended Statement of Claim.

(ii) Identifiable Class

20. There is an identifiable class which is as follows:

All persons in British Columbia who purchased Corrugated Materials Products in Canada between January 1, 1993 and December 31, 1995.

Affidavit of Michael G. Robb sworn June 16, 2006, para. 38.

(iii) Common Issue

21. The Plaintiff proposes that the proceeding be certified for the purpose of these settlements on the basis of the following common issue:

Did the Settling Defendant(s) agree to fix, raise, maintain, coordinate or stabilize the prices of, or allocate markets, volumes of sales and customers for, Corrugated Material in Canada during the Purchase Period?

Affidavit of Michael G. Robb sworn June 16, 2006, para. 39.

(iv) Preferable Procedure

22. The proposed class includes direct purchasers, distributors, indirect purchasers and consumers. In the absence of a class proceeding, given the array of class members, there would be potential for multiple overlapping proceedings in various jurisdictions with the possibility for inconsistent decisions on liability and damages. The costs of prosecuting these actions through a contested certification hearing and trial would be substantial and would likely be prohibitive and uneconomic for the vast majority of class members, thereby reducing access to justice. Certification of these actions as class proceedings will achieve the objectives of the *Class Proceedings Act*: judicial economy, behaviour modification, and access to justice.

Affidavit of Michael G. Robb sworn June 16, 2006, paras. 40-45.

(v) Representative Plaintiffs

23. South Vancouver Card Company purchased and used corrugated boxes in the course of its business during the material time. It has instructed class counsel to seek approval of the settlement agreements.

Affidavit of Michael G. Robb sworn June 16, 2006, para. 46.

Affidavit of Gordon McDonald, sworn June 15, 2006.

PART III. ISSUES AND THE LAW

(A) Background

24. Price-fixing class actions have been advanced in the United States for decades. The U.S. proceedings relate to U.S. antitrust legislation which differs in terms of its application but provides remedies for the same conduct that is alleged in this case.

25. The case of *Hanover Shoe v. United Shoe Machinery Corp.* serves as a starting point for the background of American price-fixing case law. Heard by the U.S. Supreme court in 1968, *Hanover Shoe* involved allegations by the plaintiffs that the defendants had monopolized the shoe machinery industry in violation of the Sherman Act, resulting in an overcharge. The defendants argued that the plaintiff class had passed on some or all of the overcharge and therefore, was not entitled to recover such damages. The court rejected this defence holding that the passing-on defence was not available to the defendants. In making its decision, the court determined that if the passing-on defence was permitted treble-damages actions would become too complicated, and the alleged co-conspirators "would retain the fruits of their illegality" because indirect purchasers, having only modest claims, would be unlikely to sue.

***Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), SLT-QL 1656.**

26. The above decision was affirmed in 1977 in *Illinois Brick Co. v. Illinois*, another U.S. Supreme Court decision. The State of Illinois brought an action against manufacturers and distributors of concrete block in the Greater Chicago area. The State alleged that the defendants' illegal overcharges had been passed on through various levels of contractors to the plaintiff consumers, or indirect purchasers, causing them to suffer a loss. The court held that the passing on theory must be applied uniformly for plaintiffs and defendants alike, and therefore the plaintiffs could not use the passing on theory offensively in light of the court's prior ruling that it could not be used defensively. The

court further stated that only overcharged direct purchasers, and not others in the chain of manufacture or distributors, are considered parties "injured in his business or property" within the meaning of the Clayton Act.

***Illinois Brick Co. v. Illinois*, 97 S.Ct. 2061 (1977).**

27. The result of *Illinois Brick* is to create a windfall for a direct purchaser that passes on an overcharge in whole or in part to an indirect purchaser. The indirect purchaser, who suffers a loss as a result of the conspiracy, will be barred from any recovery.
28. The decision of the U.S. Supreme Court in *Illinois Brick* was criticized in many quarters. The reasoning of its critics is largely contained within the dissent written by Mr. Justice Brennan, which was joined by Mr. Justice Marshall and Mr. Justice Blackmun. The most compelling portion of the dissent is as follows:

Today's decision flouts Congress' purpose and undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution. In these instances, the Court's decision frustrates both the compensation and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers.

***Illinois Brick Co. v. Illinois*, 97 S.Ct. 2061 (1977) at 749.**

29. Since the Supreme Court's decision in *Illinois Brick*, several states have enacted statutes which authorize indirect purchaser lawsuits ("*Illinois Brick* repealer laws"). These statutes serve to ensure that the *Illinois Brick* decision does not bar state residents from potential recoveries against alleged conspirators. The United States Supreme court has ruled that such statutes are not pre-empted by the court's decision in *Illinois Brick*.

***California v. ARC America Corp.*, 109 S. Ct. 1661 (1989) at 1665.**

30. While many of the experiences from the U.S. courts are instructive, it is not desirable for the U.S approach to be adopted in totality by the Canadian courts. The dissent in *Illinois Brick* is persuasive and is in keeping with the legislation as it exists in Canada today.
31. Numerous price-fixing class actions have been commenced in Ontario. Two of these cases, *Chadha v. Bayer* and *Price v. Panasonic Canada Inc.* were commenced on behalf of consumers only. In each of these cases, the court refused to grant certification. The plaintiffs in *Chadha* alleged price-fixing in the market for iron oxide, a product contained in bricks and other construction materials. The action was initially certified by Sharpe J., certification but this decision was reversed by the Court of Appeal. Although certification was denied by the Court of Appeal, Feldman J. was clear to point out that her reasons did not stand for the proposition that a price-fixing claim advanced on behalf of indirect purchasers could not be advanced as a class proceeding. As stated by Feldman J.:

In my view, 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.

***Chadha v. Bayer* (1999), 45 O.R. (3d) 29 (Gen. Div.) (Certification granted), (2001), 54 O.R. (3d) 520 at 549 (Div. Ct.) (Certification denied), appeal dismissed [2003] O.J. No. 27 (C.A.), leave to appeal to S.C.C. denied.**

***Price v. Panasonic Canada*, [2002] O.J. No. 2362.**

32. Several price-fixing class actions have been certified in the context of negotiated settlements. In each of the settled cases, all purchasers of the price-fixed product, including Manufacturers, Distributors, Intermediaries and Consumers, were included in the class.

***Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, [unreported], November 9, 2001 (B.S.S.C.). (Citric Acid)**

***Mura v. Archer Daniels Midland et al.* [2003] B.C.J. No. 1086 (B.S.S.C.). (Lysine)**

***Ritchie-Smith Feed, Inc. v. Rhône-Poulenc Canada Inc.*, [2005] B.C.J. No. 857 (B.S.S.C.). (Vitamins).**

***Vitapharm Canada Ltd. v. F Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.). (Vitamins)**

33. In the Ontario reasons approving the settlement in *Alfresh Beverages Canada Corp. v. Hoechst et al.*, the Honourable Mr. Justice Cumming recognized that such settlements and payments "serve the important policy objective of general and specific deterrence of wrongful conduct through price-fixing". More recently, in his reasons in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (which reasons were adopted by Justice Maczko in approving the vitamins settlement in British Columbia), Cumming J. emphasized that:

To the extent that civil damages are paid to or for the benefit of the class over and above the criminal fines and penalties which have been paid by some Settling Defendants, there will be an incentive for these Settling Defendants, and others, to refrain from engaging in the type of behaviour complained of in the future.

***Alfresh Beverages Canada Corp. v. Hoechst AG et al.*, [2002] O.J. No. 79 (S.C.J.). (Sorbates)**

***Vitapharm Canada Ltd. v. F Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.) at para. 145. (Vitamins)**

***Ritchie-Smith Feed, Inc. v. Rhône-Poulenc Canada Inc.*, [2005] B.C.J. No. 857 (B.S.S.C.).**

(B) Certification

34. Remedial legislation is to be given a broad and liberal interpretation. Because the *Class Proceedings Act* is both mandatory and remedial in nature, it should be given a large and liberal interpretation to widen access to our courts in appropriate circumstances.

***Interpretation Act*, R.S.B.C. 1996, c.238, s.8**

***Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 at 744 (Gen. Div.).**

35. In the context of a settlement, the onus on a plaintiff seeking certification for settlement purposes to establish that there is at least a prima facie case favouring certification.

Once that test is met, the question becomes whether the settlement agreement itself is fair and reasonable. This encourages the efficient judicial handling of these actions.

***Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.*, [1998]
B.C.J. No. 2936 (B.S.S.C.) at paras 15, 19.**

36. The *Class Proceedings Act* is entirely procedural. In the event that section 4 of the *Act* is satisfied, certification is mandatory. The section 4 certification test is as follows:
- (a) the pleadings disclose a cause of action;
 - (b) there is an identifiable class of 2 or more persons;
 - (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
 - (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
 - (e) there is a representative plaintiff 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, an interest that is in conflict with the interests of other class members.

***Class Proceedings Act*, R.S.B.C. 1996, c.50., s. 4.**

***Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 at 744
(Gen. Div.).**

37. In the United States, it is widely accepted that class actions play an important role in the private enforcement of antitrust laws and the courts resolve doubts in these actions in favour of certification of the class.

***In re Potash Antitrust Litigation* 159 F.R.D. 682 (D. Minn. 1995) at 688.**

***In re Corrugated Container Antitrust Litigation* 80 F.R.D. 244 (S.D. Texas 1978) at 252.**

38. It is submitted that the section 4 certification test is satisfied in the within actions and that certification would achieve the objectives of the *Class Proceedings Act*.

(i) Cause of Action

39. The test for establishing a cause of action is the same as the test on a motion to strike out pleadings, namely that the plaintiff should not be "driven from the judgment seat" where, assuming the facts stated in the statement of claim can be proved, it is not "plain and obvious" that the statement of claim does not disclose a cause of action.

***Lau v. Bayview Landmark Inc.* (1999), 40 C.P.C. (4th) 301 at 310 (S.C.J.).**

***Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980.**

40. The Plaintiff in the within action has satisfied this test. It is clear on the face of the pleading that a cause of action is established. The Plaintiff alleges that the Defendants:

(i) contravened Part VI of the *Competition Act*, giving rise to a right of damages under section 36 of the *Competition Act*,

(ii) are liable for torts of conspiracy and intentional interference with economic interests; and

(iii) are liable for punitive damages

***Chadha v. Bayer* (1999), 45 O.R. (3d) 29 (Gen. Div.).**

(ii) Identifiable Class

41. The within action has an identifiable class:

All persons in British Columbia who purchased Corrugated Materials Products in Canada between January 1, 1993 and December 31, 1995.

42. The proposed Class definition satisfies the three purposes of a class definition:

- (i) To identify persons who have a potential claim for relief against the defendants;
- (ii) To define the parameters of the lawsuit so as to identify those persons who are bound by the result; and
- (iii) To describe who is entitled to notice of certification.

Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 at 175 (Gen.Div.).

43. There is no requirement that all class members have an equivalent likelihood of success.

The defining aspect of class membership is an interest in the resolution of the proposed common issues.

Hollick v. Metropolitan Toronto (Municipality), [2001] S.C.J. No. 67 at paras. 20, 21.

Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 at paras 38, 54.

44. The proposed class definition embodies all levels of purchasers, including those who purchased Corrugated Materials directly and those who purchased Corrugated Materials Products. The court in *Illinois Brick* recognized that in the absence of a bar respecting the use of the passing-on defence, the class would necessarily have to include all levels of plaintiffs, from direct purchasers to middlemen to ultimate purchasers. All of the plaintiffs must be present to ensure that the wrongdoers do not retain any of the fruits of their illegality and to protect their right to make a claim against a common fund to address their losses.

Illinois Brick Co. v. Illinois, 97 S.Ct. 2061 (1977) at 737-38.

(iii) Common Issues

45. The Plaintiff proposes the following common issue:

Did the Settling Defendants agree to fix, raise, maintain, coordinate or stabilize the prices of, or allocate markets, volumes of sales and customers for, Corrugated Material in Canada during the Purchase Period?

46. The Supreme Court of Canada has held that in framing commonality, the guiding question should be “whether allowing the suit to proceed as a representative one would avoid duplication of fact-finding or legal analysis”.

***Rumley v. British Columbia*, [2001] S.C.J. No.39 at para 29.**

***Western Canadian Shopping Centres Inc. v. Dutton*, [2001] S.C.R.534 at para 39.**

47. In the United States, it is widely accepted that:

[An] allegation of price fixing...will be viewed as a central or single overriding issue or a common nucleus of operative fact and will establish a common question.

***Newberg on Class Actions* 3rd ed. (Shepard's/McGraw-Hill, 1992) s.18.05 at 18-21.**

48. Antitrust price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy. It has been noted by the courts that putative class members have a common interest in any proof of a concerted action, conspiracy, and of agreement with the aim and result of restricting trade.

***In Re Sugar Industry Antitrust Litigation* 73 F.R.D. 322 (E.D. PA. 1976) at 335.**

49. It is submitted that in the within action, if each class member proceeded individually against the Defendants, each would have to prove the existence and impact of the identical conspiracy to fix prices. Certification would avoid duplication of the fact-finding and legal analysis.

(iv) Preferable Procedure

50. A class proceeding is the preferable procedure in the within action because it provides a fair, efficient and manageable method of determining the common issue and because it will advance the proceeding in accordance with the goals of judicial economy, access to justice and behaviour modification. In the absence of these proceedings, it is unlikely that the majority of claims would be advanced at all. This accords with the preferability test as enunciated by the Supreme Court of Canada in *Rumley v. British Columbia* and in *Hollick v. Metropolitan Toronto (Municipality)*.

***Rumley v. British Columbia*, [2001] S.C.J. No. 39 at para. 35.**

***Hollick v. Metropolitan Toronto (Municipality)*, [2001] S.C.J. No. 67 at para. 28.**

51. Any notion of judicial economy would be destroyed if each class member is required to proceed individually against the Defendants and to prove the existence and impact of the identical conspiracy to fix prices.

***Re Catfish Antitrust Litigation* 826 F. Supp. 1019 (N.D. Miss. 1993) at 1034.**

(v) Representative Plaintiffs

52. The proposed representative plaintiff purchased Corrugated Materials and is a class member within the proposed class definition. The Plaintiff will fairly and adequately represent the interests of the class.
53. The Plaintiff has produced a plan for the proceeding in the form of settlements. The settlements set out a workable method of resolving the proceedings on behalf of the class with respect to the Settling Defendants.

(C) Settlement Approval

54. The Plaintiff submits that the settlement agreements are fair, reasonable, in the best interests of the proposed class, and ought to be approved. The settlements achieve the

goals of the *Class Proceedings Act*, and provide reasonable benefits to the class. The Plaintiff has instructed Class Counsel to seek approval of the settlements.

(i) General Principles

55. The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy.

Ontario New Home Warranty Program v. Chevron Chemical Co.
(1999), 46 O.R. (3d) 130 at 147 (Sup. Ct.).

Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225 at pp. 230, 41
B.L.R. 22 (H.C.J.).

56. For a settlement to be approved, it must be fair, reasonable, and in the best interests of the class as a whole, rather than one which meets the demands of a particular class member. In determining whether to approve a settlement, the court may take into account factors such as:

- (i) Likelihood of recovery or likelihood of success;
- (ii) Amount and nature of discovery, evidence or investigation;
- (iii) Settlement terms and conditions;
- (iv) Recommendation and experience of counsel;
- (v) Future expense and likely duration of litigation and risk;
- (vi) Recommendation of neutral parties, if any;
- (vii) Number of objectors and nature of objections;
- (viii) The presence of good faith, arms length-bargaining and the absence of collusions;
- (ix) The degree and nature of communications by counsel and the representative plaintiff with Class Members during the litigation; and

- (x) Information conveying to the court the dynamics of and the positions taken by the parties during the negotiation;

***Cardozo v. Becton, Dickinson and Co.*, [2005] B.C.J. No. 2683 at para 17.**

57. These factors should be a guide in the process and no more. In any given case, some factors will have greater significance than others and weight should be attributed accordingly.

***Cardozo v. Becton, Dickinson and Co.*, [2005] B.C.J. No. 2683 at para 18.**

***Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 at para 73 (Sup. Ct.).**

(ii) Litigation Risk and the Likelihood of Success

58. The within action has both procedural and litigation risks, risks which did not dissipated as the litigation continues proceeded. In negotiating the settlements, Class Counsel was aware of numerous risks including:

- (a) the risk that the court would not certify the action;
- (b) the risk that the court would not certify a national class;
- (c) procedural risks associated with multi party litigation;
- (d) the risk that the court would not agree that an aggregate damage assessment was possible, thus making the proof for individual class members onerous;
- (e) the risk that individual plaintiffs would encounter difficulties proving that damages were not passed on by them, or were passed on to them;
- (f) the risk that the court would find that there was no conspiracy, that the conspiracy entered into was ineffective, or that any illegal activity had little or no effect on prices;
- (g) the risk that the court would find that the defendants could only be held responsible for their own sales; and
- (h) even in the event that the plaintiff was successful in all phases in the litigation, plaintiff was aware that the defendants would likely file appeals in respect of multiple issues, thus resulting in a considerable delay in compensation for class members.

59. Additionally, Class Counsel was aware that if the Plaintiff was successful at the certification or trial stages, the Defendants would to the extent possible appeal the relevant decision. The courts have recognized that the practical value of an expedited recovery is a significant factor for consideration. In addition to the legal and factual risks, a practical concern favouring settlement includes the potential that a case would take several years to reach trial and exhaust all appeals.

***Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at 441 (Gen. Div.), aff'd at (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. denied.**

(iii) Amount of Evidence and Investigation

60. The court need not possess evidence to decide the merits of the issue because compromise is proposed in order to avoid further litigation. However, the court must possess sufficient information to raise its decision above mere conjecture.

***Newberg on Class Actions*, 3rd ed.(Shepard's/McGraw-Hill, 1992) s.11.45 at pp. 11-100, 11-111.**

***Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 at 152 (Sup. Ct.).**

61. While the court requires sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the settlement in all of the circumstances, it is not necessary that formal discovery have occurred at the time of settlement. It is clear that settlements reached at an early stage of the proceedings are appropriate.

***Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at (Gen. Div.), aff'd at (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. denied.**

62. No formal discovery was conducted in this case. However, Class Counsel had a high level of understanding regarding liability and damages which came as a result of, *inter alia*:

- (i) Class counsel's involvement in other price-fixing cases;

- (ii) Canadian sales data;
- (iii) The Settling Defendants' respective sales in Canada;
- (iv) The terms of the U.S. settlements;
- (v) Access to documents obtained through intervention in the U.S. proceedings; and
- (vi) Expert advice.

(iv) Settlement Terms

63. The settlements, which were achieved in an environment of risk, deliver significant benefits to class members. While the court must be assured that the settlements secure an adequate advantage for the class in return for the surrender of litigation rights against the defendants, the court's function is not to reopen and enter into negotiations with the parties. It is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer those concerns with changes to the settlements, however, the court's power to approve or reject settlements does not permit it to modify the terms of negotiated settlements.

Newberg on Class Actions, 3rd ed. (Shepard's/McGraw-Hill, 1992) s.11.46.

Dabbs v. Sun Life Assurance Company of Canada (1998), 40 O.R. (3d) 429 (Gen. Div.), aff'd at (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. denied.

Haney Iron Works Ltd. v. Manufacturers Life Insurance Co., [1998] B.C.J. No. 2936 (B.C.S.C.).

Manual of Complex Litigation, 3rd ed. (Federal Judicial Centre: West Publishing, 1995) at s. 30.42 at 240.

(v) Arms Length Bargaining and Recommendation of Counsel

64. These settlements were achieved as the result of adversarial arm's length negotiations. There is a strong initial presumption of fairness when a proposed class settlement which was negotiated at arms-length by counsel for the class, is presented for court approval. Parties proposing the settlement, however, also have an obligation to provide sufficient information to permit the court to exercise its function of independent approval.

***Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.), aff'd at (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. denied.**

65. Following this initial presumption, in order to reject the terms of the settlements and deem that the litigation ought to continue, the court must conclude that the settlements fall outside the range or zone of reasonableness.

***Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at 440 (Gen. Div.), aff'd at (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. denied.**

66. The court must balance the need to scrutinize the settlements against the recognition that there may be a number of possible outcomes within the range of reasonableness.

The range of reasonableness has been described as follows:

[A]ll settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect

settlement may be in the best interests of those affected by it when compared to the alternative of the risks and cost of litigation.

***Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at 440 (Gen. Div.), aff'd at (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. denied.**

67. Class Counsel has recommended approval of the settlements to the court. In the absence of evidence to the contrary, the recommendation of experienced counsel should be given great weight. Class and defence counsel have a unique ability to assess the potential risks and rewards of litigation.

***Manual for Complex Litigation*, 3rd ed. (Federal Judicial Center: West Publishing, 1995) s. 30.42 at pg. 240.**

***Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at 440 (Gen. Div.), aff'd at (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. denied.**

(D) Distribution

68. The proposed distribution protocol will confer a substantial advantage on the class. The settlement funds have been divided in manner consistent with the evidence to those who are most efficiently directly compensable. The remainder is to be distributed *cy-près*.
69. In previous price-fixing settlements approved by Canadian courts, most often only direct or top-tier purchasers are eligible for direct monetary compensation. In a smaller number of cases a second level of purchasers have been eligible for direct monetary compensation.

Ritchie-Smith Feed, Inc. v. Rhône-Poulenc Canada Inc., [2005] B.C.J. No. 857 (B.S.S.C.). (Vitamins).

Vitapharm Canada Ltd. v. F Hoffmann-La Roche Ltd., [2005] O.J. No. 1118 (S.C.J.). (Vitamins)

Alfresh Beverages Canada Corp. v. Archer Daniels Midland Company et al., [2001] O.J. No. 6028 (S.C.J.). (Citric Acid)

Alfresh Beverages Canada Corp. v. Hoechst AG et al., [2002] O.J. No. 79 (S.C.J.). (Sorbates)

Bona Foods Ltd. et al. v. Ajinomoto U.S.A., Inc. et al., [2004] O.J. No. 908 (S.C.J.). (MSG and Nucleotides)

70. The *Class Proceedings Act* permits *cy-près* distributions of the type contemplated by the Distribution Protocol. Section 29 permits damages to be assessed in the aggregate, while sections 33 and 34 permit the court to direct the distribution of settlement monies by any means it considers appropriate whether or not such a distribution would benefit persons who are not class members or persons who otherwise might receive monetary compensation as a result of the proceeding.

***Class Proceedings Act*, R.S.B.C. 1996, c. 50, sections 29, 33, 34.**

71. Such distributions have been embraced by Canadian courts. In *Alfresh Beverages Corp. v. Hoechst AG*, *supra*, the court held:

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.

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.

***Alfresh Beverages Canada Corp. v. Hoechst AG et al.*, [2002] O.J. No. 79 (S.C.J.) at paras 15-16.**

72. The proposed *cy-près* distributions contemplate distribution to organizations that will generally benefit those class members who are not eligible to receive direct compensation. This is in keeping with the meaning of *cy-près*, "next best", and with the principle that generally, funds should be distributed for a purpose as near as possible to the objectives underlying the lawsuit, the interests of the class, and the interests of those similarly situated.

***Airline Ticket Commission Antitrust Litigation*, 307 F.3d 679 (8th Circuit 2002 and 2001) at p. 4.**

(E) Summary

73. Class Counsel submits that the settlement agreements are fair, reasonable, and in the best interests of the class. Class Counsel, and the Plaintiffs have each endorsed the settlement agreements and recommended their approval to the court.

PART IV. ORDER REQUESTED

74. The Plaintiffs request that the within actions be certified, and that the settlements be approved as fair, reasonable and in the best interests of the classes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Charles M. Wright & Todd R. Davies
Solicitors for the Plaintiff