

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

LA CIE MCCORMICK CANADA CO.

Plaintiff

- and -

STONE CONTAINER CORP., JEFFERSON SMURFIT CORP., SMURFIT-STONE CONTAINER CORP., SMURFIT-MBI, formerly known as MACMILLAN BATHURST, ROGER STONE, 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

Proceeding under the *Class Proceedings Act*, 1992

**FACTUM
Certification, Stone Settlement Agreement Approval
and Approval of Distribution Protocol
(Motion Returnable August 15, 2006)**

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

LA CIE MCCORMICK CANADA CO.

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

Proceeding under the *Class Proceedings Act*, 1992

**FACTUM
CERTIFICATION AND APPROVAL OF SETTLEMENT AGREEMENT**

PART I. NATURE OF THE MOTION

1. Subject to the approval of this Court, the Plaintiff in the within action has reached a settlement with the remaining defendants in this action which will resolve the claims of Settlement Class Members.
2. This motion is for an Order
 - (i) that the within action be certified as a class proceeding as against Stone Container Corp., Jefferson Smurfit Corp., Smurfit-Stone Container Corp., Smurfit-MBI, and Roger Stone (the "Stone Defendants") for settlement purposes;
 - (ii) approving the settlement reached with the Stone Defendants (the "Stone Settlement Agreement");

- (iii) approving the Distribution Protocol for the distribution of the proceeds of the Stone Settlement Agreement and the settlements approved by this Court on May 24, 2006;
- (iv) approving the Notice of Certification and Settlement Approval for all three settlements; and
- (v) amending this Court's order dated May 24, 2006 approving the Main Settlement Agreement to correct a typographical error.

PART II. SUMMARY OF FACTS

- 3. The Plaintiffs have reached a settlement with the remaining defendants in this action. Combined with the earlier settlements approved by this Court, the approval of this settlement will conclude this litigation as against all of the defendants.
- 4. On May 24, 2006, this Court approved settlements between the Plaintiff and
 - (i) 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., Tenneco, Inc., Tenneco Packaging and Packaging Corporation of America. ("Main Settlement Agreement"); and
 - (ii) Temple-Inland Inc., Inland Paperboard and Packaging, Inc., and Gaylord Container Inc. ("Temple-Inland Settlement Agreement").

Order Approving Main Settlement Agreement dated May 24, 2006, Exhibit "A" to the Affidavit of Michael G. Robb sworn August 4, 2006.

Order Approving Temple-Inland Settlement Agreement dated May 24, 2006, Exhibit "B" to the Affidavit of Michael G. Robb sworn August 4, 2006.

5. On this motion, the Plaintiff seeks approval of a third settlement agreement (the "Stone Settlement Agreement"), entered into between the Plaintiffs and the Stone Defendants. The agreement was executed on May 25, 2006.

Affidavit of Michael G. Robb sworn August 4, 2006, para 5.

6. The Stone Settlement Agreement is conditional on court approval in Ontario, Quebec and British Columbia. It was approved by the British Columbia Supreme Court on June 21, 2006, and by the Quebec Superior Court on July 4, 2006. Each of those Courts has also approved the proposed Distribution Protocol and the Notice of Certification and Settlement Approval. The British Columbia Court requested that two changes be made, which are included in the final orders of the British Columbia and Quebec Courts. In Exhibit "C", the Distribution Protocol, appeals now are to be heard by the "relevant" court; previously the Ontario Court was to hear all appeals. Also, in Exhibit "E", where reference is made to sending the notice to industry groups, the language "with a request from the courts that they provide notice to their members across Canada" has been added.

Affidavit of Michael G. Robb sworn August 4, 2006, para 6.

Order of the British Columbia Supreme Court dated June 21, 2006, Exhibit "G" to the Affidavit of Michael G. Robb sworn August 4, 2006.

Order of the Quebec Superior Court dated July 4, 2006, Exhibit "J" to the Affidavit of Michael G. Robb sworn August 4, 2006.

The Stone Settlement Agreement

7. The Stone Settlement Agreement requires the Stone Defendants to pay a total of US\$830,000 to settle this action. The payment represents .644% of the sales of the Stone Defendants, other than Smurfit-MBI during the relevant period.

Affidavit of Michael G. Robb sworn August 4, 2006, para 9.

Stone Settlement Agreement, Exhibit "D" to the Affidavit of Michael G. Robb sworn August 4, 2006.

8. Although Smurfit-MBI was partly owned by one of the Stone Defendants during the Class Period, it operated independently throughout the period, with its own management and direction. It was a purchaser of linerboard and corrugated medium from the Defendants, and not a producer thereof. Smurfit-MBI was not a defendant in the U.S. proceedings. For these reasons, Class Counsel concluded that it was appropriate not to include Smurfit-MBI's sales for the purpose of calculating the settlement percentage, nor to consider its customers Fund 1 purchasers under the proposed Distribution Protocol, discussed below.

Affidavit of Michael G. Robb sworn August 4, 2006, para 10.

9. Paragraph 4.3(2) of the Main Settlement Agreement provides for a clause often referred to as a "Most Favoured Nations" clause, which provides as follows:

In the event of a Relevant Additional Settlement, the Settling Defendants shall be paid a refund out of the Account in the amount of (i) 0.825% minus the Relevant Additional Settlement Percentage (ii) multiplied by CDN \$110.37 million, to a maximum of 50% of the Settlement Amount or 50% of the Relevant Additional Settlement Amount, whichever is less.

The Stone Settlement Agreement triggered the Most Favoured Nations clause, and may have resulted in a payment of approximately C\$200,000. 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. The payment to Georgia Pacific Corp. will be made if the Stone Settlement Agreement is approved.

Affidavit of Michael G. Robb sworn August 4, 2006, para 11.

10. Although no formal discovery had taken place at the time the settlement was achieved, significant information was available to Class Counsel to evaluate the merits of the settlement. In entering into this settlement, Class Counsel considered the following factors:

- (i) Total sales in Canada;
- (ii) The Stone 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 and Canada, the nature of the counsel who litigated the U.S. 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 the applicable limitation period had expired. Specifically, Class Counsel were contacted by a Class Member shortly before the six year anniversary of Stone announcing that it would cease and desist from requesting, suggesting, urging, or advocating that any manufacturer or seller of linerboard raise, fix, or stabilize prices or price levels. Limitation periods therefore may have expired for all Class Members outside of Ontario, Saskatchewan, Manitoba, Prince Edward Island, New Brunswick, Nova Scotia, Yukon and Northwest Territories, the only provinces with the six year limitation periods for tort claims (at that time). Significantly, the Defendants' only Canadian linerboard production facility was a Stone Container Corp. plant in

Quebec where the limitation period was 3 years. Quite aside from the substantive defence, the differing limitation periods could have been a procedural issue in certifying a national class, and a barrier to quantifying damages in the aggregate; 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 August 4, 2006, para 12.

Class Certification

Cause of Action

11. 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 August 4, 2006, para. 14.

Statement of Claim.

Identifiable Class

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

All persons (except for members of the BC Class and the Quebec Class) who, in Canada, purchased Corrugated Material Products for delivery in Canada during the Purchase Period.

Affidavit of Michael G. Robb sworn August 4, 2006, para. 15.

Common Issue

13. 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 August 4, 2006, para. 16.

Preferable Procedure

14. 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 of 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 August 4, 2006, paras 17-19.

Representative Plaintiffs

15. La Cie McCormick Canada Co. purchases and uses corrugated boxes in the course of its business. It has instructed class counsel to seek approval of the settlement agreements.

Affidavit of Michael G. Robb sworn August 4, 2006, 23.

Affidavit of Keith Gibbons, sworn August 4, 2006, paras 5 and 10.

Distribution Protocol

16. Plaintiff's Counsel sought to devise a protocol to distribute the proceeds of the three settlement agreements (the "Settlement Monies") which would be inexpensive to administer and apply for given the limited funds available. The following paragraphs outline the proposed Distribution Protocol.

Affidavit of Michael G. Robb sworn August 4, 2006, para 25.

17. Three Funds will be created from the Settlement Monies, as follows:

(i) Fund 1, which will compensate Settlement Class Members who purchased Corrugated Material from the Defendants (excluding Smurfit-MBI) during the Purchase Period;

(ii) Fund 2, which will compensate Settlement Class Members who purchased Corrugated Material from non-Defendants and Smurfit-MBI; and

(iii) Fund 3, which will consist of \$75,000 and will be distributed to the Tree Canada Foundation for the benefit of all remaining Settlement Class Members.

Affidavit of Michael G. Robb sworn August 4, 2006, para 26.

18. Prior to allocating the Settlement Monies to Funds 1 and 2, the following expenses will be deducted:

(i) legal fees, disbursements, and taxes;

(ii) legal notice and claims administration.

Affidavit of Michael G. Robb sworn August 4, 2006, para 27.

19. It is estimated that the total Settlement Monies accumulated from all three settlement agreements will be approximately \$1,850,000, after the deduction of the payment under subsection 4.3(2) of the Main Settlement Agreement. Counsel's requested fees and disbursements (including \$36,047.84 awarded by the Quebec Superior Court) are estimated to total approximately \$670,000. The proposed notice and administration program will cost \$105,000. Based on those assumptions, there will be approximately \$900,000 for Fund 1, \$100,000 for Fund 2 and \$75,000 for Fund 3.

Affidavit of Michael G. Robb sworn August 4, 2006, para 28.

20. Fund 1 will directly compensate eligible Settlement Class Members who had purchases of Corrugated Material directly from one or more Defendants (excluding purchases from Smurfit-MBI) during the Purchase Period. This fund will be paid out pro-rata to Settlement Class Members based on their total purchases of Corrugated Material from the Settling Defendants. The Settling Defendants will, based on available records, provide the names, addresses and purchase information for their direct customers. Those Settlement Class Members will receive correspondence from the Claims Administrator which indicates their estimated total purchases during the Purchase Period. To the extent a Settlement Class Member has records which indicate additional purchases, they may be submitted.

Affidavit of Michael G. Robb sworn August 4, 2006, para 30.

21. Purchases from Smurfit-MBI are not included for the purposes of determining Fund 1 compensation as a consequence of the decision that Smurfit-MBI's position is more like that of a non-Defendant than a Settling Defendant for these purposes.

Affidavit of Michael G. Robb sworn August 4, 2006, para 31.

22. Under the terms of the Distribution Protocol, Class Members' purchases of any grade of paperboard suitable for use as the inner and outer layers of corrugated sheets ("Linerboard") will be ascribed twice the value of purchases of corrugated sheets or containers. 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 corrugated sheets and containers 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 (Linerboard purchasers as opposed to corrugated material and container purchasers) on approximately even footing.

Affidavit of Michael G. Robb sworn August 4, 2006, para 32.

23. Fund 2 will directly compensate eligible Settlement Class Members who had significant purchases (over \$250,000) of Corrugated Material from one or more non-Defendants, or Smurfit-MBI, during the class period. Fund 2 will be paid out on a per capita basis. 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.

Affidavit of Michael G. Robb sworn August 4, 2006, para 33.

24. The Fund 2 allocation was arrived at by taking into consideration 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 because the framework for these cases is very different), in the United States the law is fairly clear that damages cannot be obtained with respect to purchases from those not alleged to have been part of the conspiracy.

Affidavit of Michael G. Robb sworn August 4, 2006, para 34.

25. Given the limited funds available, it has been determined that a simple and efficient distribution methodology for Fund 2 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 August 4, 2006, para 35.

26. A relatively high level of purchases was selected as a threshold for eligibility to claim from Fund 2. This was to avoid *de minimis* claims that would have high transaction costs relative to the benefit to the individual class member. If one assumed a

reasonable settlement to a purchaser of \$250,000 of Corrugated Material was 10% of .825% (a litigation discount off of the highest settlement percentages agreed to), then \$206.25 would be payable in such a case. It was determined that no smaller case should be considered. Similarly, Fund 2 is paid per capita rather than pro rata because of a concern that the total transaction costs in assembling a claim (the burden of the Class Member) and reviewing that claim (the burden of the Claims Administrator and therefore the Fund) would be greater than the ultimate size of the claim and therefore would both be inefficient and would discourage the filing of claims.

Affidavit of Michael G. Robb sworn August 4, 2006, para 36.

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

Affidavit of Michael G. Robb sworn August 4, 2006, para 37.

28. Settlement Class Members eligible for direct compensation must complete a Claim Form, and submit certain required documentation outlined in the Claim Form. The Claim Form together with the required supporting documentation must be submitted to the Claims Administrator by the claims deadline which is ninety days from the date of first publication of the Notice of Certification and Settlement Approval.

Affidavit of Michael G. Robb sworn August 4, 2006, para 38.

29. Pursuant to the terms of the Distribution Protocol, \$75,000.00 has been allocated to be paid to the Tree Canada Foundation which will indirectly benefit Settlement Class Members who are not eligible for direct compensation. The Tree Canada Foundation was selected to receive this portion of the settlement because directing these funds to the Tree Canada Foundation reflects how direct purchasers of the defendants tend to believe their customers and the population at large ought to be served. Class Counsel was unable to identify an organization which would more closely address the

consumer pricing concerns raised by this lawsuit. Tree Canada is directed towards addressing one of the ancillary effects of this industry by encouraging Canadians to plant and care for trees. The diverse geographic reach of the Tree Canada Foundation's proposal (with projects in Sudbury, Ontario; East Hants, Nova Scotia, Kelowna, British Columbia, and Gatineau, Quebec) ensures that the benefits are not directed to any one identifiable subset of the class.

Affidavit of Michael G. Robb sworn August 4, 2006, para 39.

30. Tree Canada Foundation was established in 1992, and will use the funds for reforestation for environmental purposes across Canada.

Affidavit of Michael G. Robb sworn August 4, 2006, para 40.

31. The Plaintiff has retained Dr. James Brander to provide an opinion on whether the *cy pres* allocation in the distribution protocol is within the reasonable range. Dr. Brander is the Asia-Pacific Professor of International Business in the Sauder School of Business at the University of British Columbia. Dr. Brander's primary areas of specialization include industrial organization and competition policy, and he has significant experience in the assessment of economic losses in various contexts including class action lawsuits.

Affidavit of James Brander, sworn July 31, 2006, paras 1, 4, 5, 7.

32. Dr. Brander calculates that Fund 3 constitutes approximately 6% of the total allocated to Settlement Class Members. In his opinion, having assessed the economic data for this industry, the uses to which this product is put, the nature of the market, and the other factors relevant to assessing the potential claims of the Settlement Class Members for whom the *cy pres* portion of the Settlement Amounts is allocated, Dr. Brander concludes that the *cy pres* allocation is a reasonable reflection of the portion

of the loss suffered by those Settlement Class Members for whom it is allocated.

Affidavit of James Brander, sworn July 31, 2006, paras 11, 13, 14, 21, 22, 23, 26.

Notice of Certification and Settlement Approval

33. Based on the information gathered in the course of litigating this case, including through interactions with experts retained to assist Class Counsel believes that the Class consists of the following types of persons:

(i) Independent corrugators and others who purchased Linerboard directly from the defendants;

(ii) Indirect purchasers who purchased corrugated sheets and containers from the defendants or from independent corrugators;

(iii) Wholesalers, retailers, and others such as movers who regularly purchase containers or products shipped in containers in the course of their business; and

(iv) Consumers who purchased products shipped or packaged in containers made from corrugated sheets.

Affidavit of Michael G. Robb sworn August 4, 2006, para 43.

34. Pursuant to the terms of the settlement agreements, the notice of certification and settlement approval is to be published once in the Globe and Mail (National Edition), Le Journal de Montreal, and Le Journal de Quebec.

Affidavit of Michael G. Robb sworn August 4, 2006, para 44.

35. The notice will also be posted on Class Counsel's website, on the website for the Consumers' Association of Canada and a copy sent by direct mail to each of the Defendants' customers, to the extent they have been able to provide the identities of those customers.

Affidavit of Michael G. Robb sworn August 4, 2006, para 45.

36. Upon approval of the Notice, Class Counsel will also contact the following groups with a request that they assist in disseminating the Notice to their memberships:

Organization	Membership description
Canadian Association of Movers	The trade association for moving and storage companies, consisting of Canada's leading
Canadian Corrugated Case Association	A trade association mandated to meet the needs of those whose principal business is the manufacture of corrugated sheets and containers.
Association of the Independent Corrugated Converters	Represents independent corrugated packaging manufacturers.
Packaging Association of Canada	Members included suppliers and users of every kind of packaging, material, equipment and service.
Canadian Manufacturers and Exporters Association	Canada's largest trade and industry association with membership drawn from all sectors of Canada's manufacturing and exporting community. Members account for 75% of Canada's total manufacturing and 90% of exports
Retail Council of Canada	Represents more than 40,000 retailers.
Canadian Federation of Independent Grocers	3,800 member association of independent and franchised grocers
Canadian Council of Grocery Distributors	Organization committed to advancing the interests of the grocery distribution industry

Affidavit of Michael G. Robb sworn August 4, 2006, para 46.

37. In order to increase the likelihood that these industry groups would agree to distribute the Notice to their memberships, Justice Pitfield of the British Columbia Supreme Court included in his orders approving the settlements a "request" that certain of those organizations do so.

Orders of the British Columbia Supreme Court dated June 21, 2006, Exhibits "E", "F" and "G" to the Affidavit of Michael Robb, sworn August 4, 2006.

38. The proposed method of dissemination has already been approved by the British Columbia Supreme Court and the Quebec Superior Court. Class Counsel propose that notice of certification and settlement approval of these settlements be published as soon as practicable after it has been approved in Ontario.

Orders of the British Columbia Supreme Court dated June 21, 2006, Exhibits "E", "F" and "G" to the Affidavit of Michael Robb, sworn August 4, 2006.

Orders of the Quebec Superior Court dated July 4, 2006, Exhibits "H", "I" and "J" to the Affidavit of Michael Robb, sworn August 4, 2006.

Affidavit of Michael G. Robb sworn August 4, 2006, para 50.

39. This program has been designed with information provided by the Plaintiff's expert economist to identify target the various levels of Class Members and specific industries in which Corrugated Materials are used, and thus to make the notice more effective.

Affidavit of Michael G. Robb sworn August 4, 2006, paras 49.

Amendment of the May 24, 2006 Order

40. On May 24, 2006, this Court issued the order approving the Main Settlement Agreement. The Order as issued contains a typographical error in paragraph 7 which ought to be corrected. Paragraph 7(a) purports to amend subsection 1(30) of the Main Settlement agreement, but was intended to refer to subsection 1(31). Paragraph 7(b) purports to amend subsection 1(32) of the Main Settlement Agreement, but was intended to refer to 1(33).

Affidavit of Michael G. Robb sworn August 4, 2006, paras 53-55.

PART III. ISSUES AND THE LAW

41. Certification for settlement purposes and approval of the Stone Settlement Agreement will bring an end to this litigation on a fair basis. This is the latest in a series of 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.

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)

Minnema v. Archer Daniels Midland et al. (February 28 2003), (Ont. S.C.J.) [unreported]. (Lysine)

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

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

Stone Paradise Inc. v. Bayer Inc. et al. (November 16/05), (Ont. S.C.J.) [unreported]. (EPDM)

42. In 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.*, 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)

(A) Certification

43. Remedial legislation is to be given a broad and liberal interpretation. Because the *Class Proceedings Act, 1992*, 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.O. 1990, c.I.11, s. 10.**

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

44. The *Class Proceedings Act* is entirely procedural. In the event that section 5(1) of the *Act* is satisfied, certification is mandatory. The section 5(1) 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*, 1992, S.O. 1992, c. C-6, subsection 5(1).**

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

45. 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.

46. It is submitted that the section 5(1) certification test is satisfied in the within actions and that certification would achieve the objectives of the *Class Proceedings Act, 1992*.

(i) Cause of Action

47. 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.

48. 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

49. The within action has an identifiable class:

All persons (except for members of the BC Class and the Quebec Class) who, in Canada, purchased Corrugated Material Products for delivery in Canada during the Purchase Period.

50. 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.).

51. 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.

52. 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 purchasers 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

53. The Plaintiff proposes 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?

54. 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.

55. 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.

56. 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.

57. 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

58. 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.

59. 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

60. 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.

Affidavit of Keith Gibbons, sworn August 4, para 4.

61. 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.

(B) Settlement Approval

62. 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, 1992* and provide reasonable benefits to the class. The Plaintiff has instructed Class Counsel to seek approval of the settlements.

Affidavit of Keith Gibbons, sworn August 4, 2006, para 10.

(i) General Principles

63. 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.).

64. 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;

65. 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.

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

66. The within action has both procedural and litigation risks, risks which did not dissipate 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 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 the applicable limitation period had expired. Specifically, Class Counsel were contacted by a Class Member shortly before the six year anniversary of Stone announcing that it would cease and desist from requesting, suggesting, urging, or advocating that any manufacturer or seller of linerboard raise, fix, or stabilize prices or price levels. Limitation periods therefore may have expired for all Class Members outside of Ontario, Saskatchewan, Manitoba, Prince Edward Island, New Brunswick, Nova Scotia, Yukon and Northwest Territories, the only provinces with the six year limitation periods for tort claims (at that time). Significantly, the Defendants' only Canadian linerboard production facility was a Stone Container Corp. plant in Quebec where the limitation period was 3 years. Quite aside from the

substantive defence, the differing limitation periods could have been a procedural issue in certifying a national class, and a barrier to quantifying damages in the aggregate; and

- (i) 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.

67. 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

68. 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.).

69. 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 (Gen. Div.), aff'd at (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. denied.

70. 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

71. 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. In this case, the Court indicated areas of concern in the course of approving the Main Settlement Agreement and the Temple-Inland Settlement Agreement, and the parties endeavoured to address those concerns in crafting the Stone Settlement Agreement.

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.

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

72. 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.**

73. 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.**

74. 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.**

75. 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.

(C) Distribution

76. 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 pres*.

77. 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.

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)

78. The *Class Proceedings Act, 1992* permits *cy pres* distributions of the type contemplated by the Distribution Protocol. Section 24 permits damages to be assessed in the aggregate, while section 26 permits 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, 1992, S.O. 1992, c. C.6, sections 24 and 26.

79. 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.

80. The proposed *cy pres* 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 pres*, "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.

81. *Cy-pres* distributions may be approved even where class members benefit only as members of the public where there are other benefits to be obtained from the settlement, a more direct way of providing benefits to this subset of the class is not evident, and behaviour modification is in issue.

Currie v. McDonald's Restaurants of Canada Ltd., [2006] O.J. No. 813 (S.C.J.) at para 14.

(D) Summary

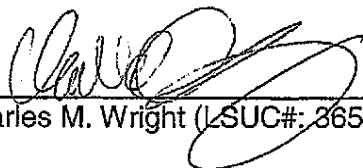
82. Class Counsel submits that the settlement agreements are fair, reasonable, and in the best interests of the class. Class Counsel, and the Plaintiffs have each endorsed the settlement agreements and recommended their approval to the court. The Distribution Protocol delivers benefits to the Settlement Class, and is reasonably reflective of the burden of the loss borne by Settlement Class Members. The Notice of Certification and Settlement Approval is adequate and the proposed method of dissemination will adequately advise the class of the settlement of the action.

PART IV. ORDER REQUESTED

83. The Plaintiffs request an order that:

- (i) the within action be certified for settlement purposes against the Stone Defendants;
- (ii) that the Stone Settlement Agreement be approved as fair, reasonable and in the best interests of the class; and
- (iii) the Distribution Protocol be approved;
- (iv) the Notice of Certification and Settlement Approval be approved; and
- (v) the Order dated May 24, 2006 approving the Main Settlement Agreement be corrected.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Charles M. Wright (LSUC#: 36599Q)

Solicitors for the Plaintiff

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at London

Proceeding under the *Class Proceedings Act, 1992*

FACTUM

**Certification, Stone Settlement Agreement
Approval and Approval of Distribution Protocol
(Returnable August 15, 2006)**

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