

**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 and Approval of Settlement Agreements
(Motion Returnable May 2, 2006)**

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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 AND APPROVAL OF SETTLEMENT AGREEMENTS**

PART I. NATURE OF THE MOTION

1. Subject to the approval of this Honourable Court, the Supreme Court of British Columbia, and the Superior Court of Quebec, the Plaintiff in the within action has reached two separate settlements which will resolve the claims of Settlement Class Members.
2. This motion is for Orders that the within action be certified as class proceedings as against the Settling 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 by Notice of Action issued on February 20, 2004. 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 British Columbia and Quebec.

Statement of Claim

Affidavit of Michael G. Robb, sworn April 20, 2006, para. 4.

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 April 20, 2006, paras. 6, 7.

(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 April 20, 2005, paras. 8, 9 and 10.

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\$92,500.00. 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 April 20, 2005, para. 11.

(C) The Canadian Settlements

7. The Main Settlement Agreement is dated December 1, 2005 and the Temple Inland Settlement Agreement was executed on March 29, 2006 following arms-length settlement discussions. Pursuant to the terms of the Main Settlement Agreement, the Settling Defendants agreed to pay a combined CDN\$935,528.00. The Settling Defendants in the Temple-Inland Settlement Agreement agreed to pay US\$20,000.00. In addition to monetary compensation, the Temple-Inland Defendants provided cooperation to the plaintiffs.

Affidavit of Michael G. Robb, sworn April 20, 2006, paras. 2, 12 and 13.

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\$10,000.00 to the Settling Defendants in the Main Settlement Agreement.

Affidavit of Michael G. Robb, sworn April 20, 2006, para. 14.

9. Each settlement requires that an order be obtained barring all claims for contribution and indemnity against the Settling Defendants (excluding claims made by persons who have opted out of the agreement). In addition, the plaintiff shall restrict its claim against the Non-Settling Defendants, on a joint and several basis, to damages which are allocable to the conduct and sales of the Non-Settling Defendants.

Affidavit of Michael G. Robb, sworn April 20, 2006, para. 16.

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; and

- (h) 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 April 20, 2006, para. 15.

- 11. Given the amount of the settlements and the high cost of distributing the settlement funds, the Plaintiffs propose holding the settlement funds in trust pending further judgments or resolutions in the continuing litigation with other defendants.

Affidavit of Michael G. Robb, sworn April 20, 2006, para. 17.

(D) Class Certification

(i) Causes of Action

- 12. 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 April 20, 2006, para. 21.

Statement of Claim

(ii) Identifiable Class

- 13. There is an identifiable class which is as follows:

All persons in Canada who purchased Corrugated Materials Products in Canada between January 1, 1993 and December 31, 1995 except the Defendant, subsidiaries or affiliates of each Defendant, and the entities in which each Defendant or any of the Defendant's subsidiaries or affiliates who have a controlling interest.

Affidavit of Michael G. Robb, sworn April 20, 2006, para. 22.

(iii) Common Issue

- 14. 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 April 20, 2006, para. 23.

(iv) Preferable Procedure

15. 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, 1992*: judicial economy, behaviour modification, and access to justice.

Affidavit of Michael G. Robb, sworn April 20, 2006, paras. 24 - 26.

(v) Representative Plaintiffs

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

Affidavit of Michael G. Robb, sworn April 20, 2006, para. 30.

Affidavit of Keith Gibbons, sworn April 20, 2006, paras. 4, 10.

PART III. ISSUES AND THE LAW

(A) Background

17. 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.

18. 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.**

19. 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).**

20. 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.
21. 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.**

22. 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 statues are not pre-empted by the court's decision in *Illinois Brick*.

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

23. 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 Ontario courts. The dissent in *Illinois Brick* is persuasive and is in keeping with the legislation as it exists in Canada today.

24. 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.**

25. Many price-fixing class actions have been certified in Ontario 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)**

***Bona Foods Ltd. v. Pfizer Inc. et al.* (August 6 2002), (Ont. S.C.J.) [unreported]. (Sodium Erythorbate)**

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

***Newly Weds Foods Co. v. Pfizer Inc. et al.* (April 7 2003), (Ont. S.C.J.) [unreported]. (Maltol)**

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

A&M Sod Supply Ltd. v. Akzo Nobel Chemicals B.V. et al. (December 22 2003), [unreported]. (MCAA)

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)

Randall Klein Inc. v. Nan Ya Plastics Corp. et al. (June 29, 2005), (Ont. S.C.J.) [unreported]. (Polyester Staple)

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

Luigi Del Guercio o/a Westown Shoe Clinic (November 16/05), (Ont. S.C.J.) [unreported]. (PCP)

26. In 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 *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)

(B) Certification

27. 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.).

28. In *Bona Foods*, Cullity J. reviewed at some length the factors to be considered where a consent certification is sought. He stated in part:

In previous decisions of this court, and in British Columbia, parties seeking approval of a settlement have not been required to satisfy the court that certification would have been granted in any event.

Later the Court stated:

I also believe that it is clear in logic, common sense and the previous practice of the court that the settlement context must be allowed to affect the questions whether the requirements for certification are satisfied.

***Bona Foods Ltd. et al. v. Ajinomoto U.S.A., Inc. et al.*, [2004] O.J. No. 908 (S.C.J.) at paras 11 and 20**

29. The *Class Proceedings Act, 1992*, is entirely procedural. In the event that section 5 of the *Act* is satisfied, certification is mandatory. The section 5 certification test is as follows:

- (i) The pleadings or the notice of action disclose a cause of action;
- (ii) There is an identifiable class of two or more persons that would be represented by the representative plaintiff;
- (iii) The claims or defences of the Class Members raise common issues;
- (iv) A class proceeding would be the preferable procedure for the resolution of the common issues; and
- (v) There is a representative plaintiff or defendant who,
 - (a) Would fairly and adequately represent the interests of the class;
 - (b) Has a plan which sets out a workable method for the advancement of the proceeding on behalf of the class, including notification of class members; and
 - (c) Does not, on the common issues, have an interest in conflict with the interests of other class members.

Class Proceedings Act, 1992, S.O. 1992, c.6., s.5.

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

30. 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.

31. It is submitted that the section 5 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

32. The test for establishing a cause of action is the same as the test enunciated in respect of Rule 21 of the *Ontario Rules of Civil Procedure*, 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.

33. The Plaintiff in the within action has satisfied the Rule 21 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

34. The within action has an identifiable class:

All persons in Canada who purchased Corrugated Materials Products in Canada between January 1, 1993 and December 31, 1995. except the Defendants, subsidiaries or affiliates of each Defendant, and the entities in which each Defendant or any of the Defendant's subsidiaries or affiliates who have a controlling interest.

35. The proposed Class definition satisfies the three purposes of a class definition as outlined in *Bywater v. Toronto Transit Commission*:

(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.).

36. National classes have been certified by the Ontario court in many class actions. Recently, Sharpe J.A. said that "there are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation."

Currie v. McDonald's Restaurants of Canada Ltd., [2005] O.J. No. 506 (C.A.) at para. 15.

Vitapharm Canada Ltd. v. F Hoffmann-La Roche Ltd., [2005] O.J. No. 1118 (S.C.J.) at para. 31. (Vitamins)

37. 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.

38. The proposed class definitions embody 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

39. The Plaintiff respectively 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?

40. 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.**

41. 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.**

42. 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.**

43. 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

44. 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.**

45. 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

46. 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.

47. 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

48. 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.

(i) General Principles

49. 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.).

50. 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;

Dabbs v. Sun Life, Assurance Company of Canada, [1998] O.J. No.1598 at 13 (Gen. Div.); and (1998), 40 O.R. (3d) 429 at 440-444 (Gen. Div.), aff'd at (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. denied.

Parsons v. The Canadian Red Cross Society, [1999] O.J. No. 3572 at paras. 71, 72, (Sup. Ct.), online: Q.L. (ORP).

51. 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.), online: Q.L. (ORP).

(ii) Litigation Risk and the Likelihood of Success

52. The within action has both procedural and litigation risks, risks which have not dissipated as the litigation continues against the Non-Settling Defendants. 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.

53. 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

54. 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.).

55. 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 Co. of Canada, [1998] O.J. No. 1598 at paras. 15 and 24 (Gen. Div.), online: QL (ORP).

56. 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

57. 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 Co. of Canada, [1998] O.J. No. 1598 at para. 10 (Gen. Div.), online: QL (ORP).

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

(v) Bar-Orders and Releases

58. As part of the settlements, the parties are seeking orders barring any future claim for contribution or indemnity. The Main Settlement provides that:

- (a) all claims for contribution, indemnity or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, taxes and costs, relating to the Released Claims, which were or could have been brought by any Non-Settling Defendant or any other person or party, against a Releasee, are barred, prohibited and enjoined in accordance with the terms of this paragraph (unless such claim is made in respect of a claim by a person who has validly opted out of a Settlement Class);
- (b) the Settlement Class Members shall restrict their joint and several claims against the Non-Settling Defendants such that the Settlement Class Members

shall be entitled to claim and recover from the Non-Settling Defendants, on a joint and several basis, only those damages (including punitive damages) arising from and allocable to the conduct of the Non-Settling Defendants;

- (c) the Settlement Class Members shall not claim from any Non-Settling Defendants that portion of any damages arising from and allocable to the conduct of an insolvent Non-Settling Defendant which any solvent Non-Settling Defendant would, but for this order, be able to claim contribution for from one or more of the Settling Defendants
- (d) a Non-Settling Defendant may seek an order from a Court providing for discovery from some or all of the Settling Defendants as deemed appropriate by the Court; and
- (e) a Non-Settling Defendant may effect service of the motion(s) referred to in section 8.1(d) on a Settling Defendant by service on counsel of record for the Settling Defendant in the Proceeding.

The Temple-Inland Settlement provides that [differences in language are italicized]:

- (a) all claims for contribution, indemnity or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, taxes and costs, relating to the Released Claims, which were or could have been brought by any Non-Settling Defendant or any other person or party, against a Releasee, are barred, prohibited and enjoined in accordance with the terms of this paragraph (unless such claim is made in respect of a claim by a person who has validly opted out of a Settlement Class);
- (b) the Settlement Class Members shall restrict their joint and several claims against the Non-Settling Defendants such that the Settlement Class Members shall be entitled to claim and recover from the Non-Settling Defendants, on a joint and several basis *as between the Non-Settling Defendants* only, those damages (including punitive damages) arising from and allocable to the conduct of the Non-Settling Defendants;
- (c) the Settlement Class Members shall not claim from any Non-Settling *Defendant* that portion of any damages arising from and allocable to the conduct of an insolvent Non-Settling Defendant which any solvent Non-Settling Defendant would, but for this order, be able to claim contribution for from one or more of the Settling Defendants;
- (d) a Non-Settling Defendant may seek an order from a Court providing for discovery from some or all of the Settling Defendants as deemed appropriate by the Court; and
- (e) a Non-Settling Defendant may effect service of the motion(s) referred to in section 7.1(d) on a Settling Defendant by service on counsel of record for the Settling Defendant in the *Proceedings*.

59. It is submitted that the form of the bar orders are fair and properly balances the competing interests of the Settlement Class Members, the Settling Defendants and the Non-Settling Defendants.

60. The courts encourage settlement of complex litigation. As noted by Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.*

...the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.

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

***Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 at p. 147 (S.C.J.).**

61. Bar orders have their origin in the United States and are frequently used to achieve settlement in complex tort and securities litigation, including class proceedings. In the California case of *Nelson v. Bennett*, District Court Judge Ramirez traced the history of the development of such orders and commented that they arose to counteract the inhibiting effect of claims for contribution on settlement. From a policy perspective, Ramirez J. concluded that ruling in favour of a bar order would "accommodate both the interests of settlement and fairness of deterrence". He further stated that a "no bar" rule would give "exclusive weight to fairness and deterrence at the complete expense of settlement".

***Nelson v. Bennett*, 662 F. Supp. 1324 (E.D. Cal. 1987), U.S. Dist. Lexis 4818, QL at page 14.**

62. In *In re Nucorp Energy Securities Litigation*, District Court Judge Irving went so far as to say that without some sort of settlement bar, partial settlement of any federal securities case before trial is, *as a practical matter, impossible*. Any single defendant who refuses to settle, forces all other defendants to trial. Anyone foolish enough to settle without barring contribution is courting disaster.

***In re Nucorp Energy Securities Litigation*, 661 F. Supp. 1403 (S.D. Cal. 1987), U.S. Dist. Lexis 14233, QL, at pages 4-5.**

63. Canadian courts and legislators have shared these concerns. As noted above, courts favour settlement wherever possible and have found that the underlying principles of American bar orders may be applied in Canada.
64. In *Ontario New Home Warranty Program v. Chevron Chemical Co.*, a settlement agreement preventing non-settling defendants from making claims for contribution or indemnity was approved by the court. In so deciding, Winkler J. considered many American authorities in support of the proposed bar order and concluded that while the U.S. cases were not dispositive of the issue, the underlying principles were applicable and, in the Ontario context, sections 12 and 13 of the *Class Proceedings Act, 1992*, provided a mechanism for supporting these principles.

I do, however, find that the underlying principles on which "bar orders" are granted in the American cases have some application to these proceedings. Moreover, the *Class Proceedings Act* provides a specific mechanism through which these objectives can be achieved in class proceedings in Ontario. Under s. 13 a court may "stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate". This broad discretion is buttressed by s. 12 which permits the court, on a motion by a party or class member, to make such orders as are necessary to ensure the fair and expeditious determination of the class proceeding.

Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130 at p. 141 (S.C.J.).

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 12 and 13.

65. Following the *Ontario New Home Warranty* decision, bar orders have been approved in the class action context in order to facilitate partial settlements in mass tort claims that benefit the plaintiffs and achieve the goals of the class proceeding legislation. Most recently, in a pair of price-fixing cases, the court approved a bar order. The bar orders sought by the Plaintiffs in the within actions closely mirror those which have been approved in similar contexts and ought to be approved.

Millard v. North George Capital Management Ltd., [2000] O.J. No. 1535 (S.C.J.).

Sawatzky v. Societe Chirurgicale Instrumentarium Inc., [1999] B.C.J. No. 1814 (S.C.).

Killough v. Canadian Red Cross Society, [2001] B.C.J. No. 1481 (S.C.).

Gariepy v. Shell Oil Co., [2002] O.J. No. 4022 (S.C.J.).

Bona Foods Ltd. v. Ajinomoto U.S.A. Inc. [2004] O.J. No. 908 (S.C.J.).

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

(vi) Arms Length Bargaining and Recommendation of Counsel

66. 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] O.J. No.1598 at para. 16 (Gen. Div.), online: QL (ORP).

67. 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.

68. 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.

69. 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.

70. In situations where the litigation will continue if the settlement is not approved or where litigation is continuing against other defendants, the court must be mindful that there are constraints to which class counsel can be expected to make disclosure of the strengths and weaknesses of their case.

Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 1598 at para. 16 (Gen. Div.).


(D) **Summary**

71. 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

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at LONDON

**FACTUM
Certification and Settlement Approval**

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