

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*,  
2009 BCCA 503

Date: 20091112  
Docket: CA036142

Between:

**Pro-Sys Consultants Ltd.**

Appellant  
(Plaintiff)

And

**Infineon Technologies AG, Infineon Technologies North America Corp., Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor Manufacturing America, Inc., Samsung Electronics Co. Ltd., Samsung Semiconductor, Inc., Samsung Electronics America, Inc., Samsung Electronics Canada Inc., Micron Technology, Inc. and Micron Semiconductor Products, Inc. doing business as Crucial Technologies, Elpida Memory, Inc. and Elpida Memory (USA) Inc.**

Respondents  
(Defendants)

Before: The Honourable Madam Justice Ryan  
The Honourable Mr. Justice Smith  
The Honourable Mr. Justice Bauman

On appeal from: Supreme Court of British Columbia, May 6, 2008, (Pro-Sys Consultants Ltd. v. Infineon Technologies AG, 2008 BCSC 575, L043141)

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Counsel for the Respondent, Elpida	C.P. Naudie and T.J. Mallett
Place and Date of Hearing:	Vancouver, British Columbia February 24, 25 and 26, 2009
Place and Date of Judgment:	<b>VANCOUVER</b> Vancouver, British Columbia November 12, 2009

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**COURT OF APPEAL  
REGISTRY**

**Written Reasons by:**

The Honourable Mr. Justice Smith

**Concurred in by:**

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Bauman

**Reasons for Judgment of the Honourable Mr. Justice Smith:**

**Introduction**

[1] The central issue in this case is whether an action brought to recoup unlawful overcharges resulting from price-fixing by manufacturers of a component of electronics products is suitable for certification as a class proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [CPA].

[2] In its statement of claim, the appellant seeks damages in tort for civil conspiracy to fix prices and for intentional interference with economic interests. It also seeks damages pursuant to s. 36(1) of the *Competition Act*, R.S. 1985, c. C-34, which provides for their recovery by “[a]ny person who has suffered loss or damage as a result of” price-fixing and other anti-competitive offences. As well, it seeks restitutionary awards in unjust enrichment, constructive trust, and waiver of tort, including orders that the respondents account for and disgorge the profits of their unlawful conspiracy. It asserts that the monetary claim can be quantified on an aggregate basis as the difference between the prices actually obtained by the respondents for the component and the prices they would have obtained but for their conspiracy. Further, it seeks punitive damages.

[3] Mr. Justice Masuhara dismissed the appellant’s certification application. He rejected the appellant’s claim to have the monetary award assessed on an aggregate basis as a common issue and decided that, although the allegations of unlawful conduct by the respondents could be determined as common issues, payment of the unlawful overcharge could not be proven on common evidence for all purchasers of products containing the component. Since he considered that causation and damage would have to be proven for each class member in order to establish liability and that the appellant had not demonstrated it could prove individual causation and damage on common evidence, he concluded that liability was not a common issue, that individual issues would predominate, and that a class action would therefore be unmanageable and would not be the preferable procedure for resolution of the claims. He concluded, as well, that the appellant would not fairly

and adequately represent the interests of the class, that it had “irreconcilable conflicts” with other class members, and that it had not presented an adequate litigation plan. His reasons are indexed as 2008 BCSC 575 and are reported at [2008] B.C.J. No. 831, 2008 CarswellBC 943.

[4] For the reasons that follow, it is my view that he erred in concluding that the aggregate monetary claim could not be tried as a common issue. If that issue should be tried on common evidence along with the common issues concerning the respondents’ alleged wrongful conduct, the common issues trial would have the potential to decide liability and even to determine the entire action without resort to individualized inquiries. In that case, a class proceeding would clearly be the preferable procedure. Further, in my view the appellant is a suitable representative plaintiff and its litigation plan is sufficient at this stage of the proceeding. I would allow the appeal.

### **Background**

[5] The respondents are manufacturers of a semiconductor memory chip known as “DRAM” (an acronym for “dynamic random access memory”), which provides high-speed electronic storage and retrieval of information in nearly all computer, telecommunication, and other electronic products in use today.

[6] The respondents, except Micron, have pleaded guilty in the United States of America to criminal charges arising out of an international conspiracy to fix prices of DRAM during the period April 1, 1999 to June 30, 2002 (the “class period”). They have paid agreed-upon fines totalling \$731 million (USD) and, as well, a number of their executive officers have paid fines and served prison terms for their related criminal conduct. Micron was given amnesty by the United States Department of Justice in exchange for its cooperation in the investigation.

[7] Three of the respondents have settled class actions brought in the United States by purchasers of DRAM directly from them for a collective amount of approximately \$160 million (USD). A number of class actions brought by purchasers

further down the production and marketing chains (“indirect purchasers”) are ongoing in state courts.

[8] To date, the respondents have not been charged with any criminal activity in Canada and have not paid any fines or penalties to Canadian regulators nor any compensation to Canadian purchasers of DRAM, other than Canadian purchasers, if any, who were parties to the settlement of the direct-purchaser class actions in the United States.

[9] The respondents are the major producers of DRAM. During the class period, they collectively accounted for 76% to 82% of worldwide DRAM production. Global revenues from the sale of DRAM during the period were approximately \$80 billion (USD).

[10] The cost of DRAM as a component of electronics products typically represents a small percentage of the price of the various products in which it is used – less than 1% in most. Approximately 81% of DRAM is used in personal computers. During the class period, DRAM’s component cost represented from 1.1% to 8.6% of the average price of major-brand desktop personal computers and from 1% to 3.5% of the average price of laptop computers.

[11] The appellant purchased a laptop computer from a retailer in British Columbia during the class period for approximately \$3,000.00. It alleges the computer contains DRAM, that the respondents control the vast majority of the market for DRAM in British Columbia, that the respondents engaged in an international cartel to fix prices of DRAM during the class period, and that, as a result, it paid more for the computer than it would have but for the illegal price-fixing. It brought this action on behalf of all persons in British Columbia who, during the class period, purchased DRAM manufactured by the respondents or products containing DRAM manufactured by the respondents either directly from the respondents or indirectly from intermediate purchasers.

[12] The appellant’s action is one of three similar aspirant class actions brought against the respondents in Canada, the others being in Ontario and Quebec. Together, they encompass all direct and indirect purchasers of DRAM from the

respondents in Canada during the class period. We are advised that application to certify the Ontario action has been deferred pending this decision. An application to certify the Quebec action was dismissed: see *Option consommateurs c. Infineon Technologies AG*, 2008 QCCS 2781. An appeal is pending: see 2008 QCCA 2136.

**The Relevant Provisions of the CPA**

[13] The requirements for certification as a class proceeding are set out in s. 4 of the CPA:

4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (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.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
- (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- (d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[14] The power to make aggregate monetary awards is set out in Division 2 of the *CPA*. The following provisions are relevant:

29 (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if

(a) monetary relief is claimed on behalf of some or all class members,

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

...

30 (1) For the purposes of determining issues relating to the amount or distribution of an aggregate monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

### **The Proposed Common Issues**

[15] The chambers judge set out the appellant's proposed common issues at para. 134 of his reasons. In essence, they make up the discrete elements of the various causes of action pleaded. Since the reasons are readily available, I will not reproduce these questions in all their detail. At the hearing, the appellant dealt with the issues more broadly. As the chambers judge said,

[135] In particular, the plaintiff submits that the dominant issue of liability is common:

Did the defendants' conspire to fix the price of DRAM?

What was the scope of the conspiracy?

What was the effect of that conspiracy?

[136] The plaintiff submits that once these dominant common issues are resolved by the court, there are "class-wide, and therefore common, ways of determining causation and damages."

[137] The issues the plaintiff says can be addressed and answered on a class-wide basis are:

- (a) Was the conspiracy effective in raising prices to direct purchasers, including some of the Class Members?
- (b) Did indirect purchasers, including the remaining Class Members, pay more because of the conspiracy?
- (c) Did the defendants profit because of the conspiracy?
- (d) Are the class members entitled to punitive damages and, if so, in what amount?

**The Reasons of the Chambers Judge**

[16] The chambers judge concluded the appellant's causes of action were adequately pleaded.

[17] The class proposed by the appellant was

The plaintiff and all persons resident in British Columbia excluding the defendants and their present and former parents, subsidiaries and affiliates, and the judge hearing this application and his or her immediate family, who purchased dynamic random access memory ("DRAM") or products which contained DRAM in, into or from British Columbia between from April 1, 1999 to June 30, 2002 (the "Class Period") (collectively, the "Class Members").

The chambers judge found this class acceptable subject to the exclusion of "direct purchasers of DRAM (and their affiliates, agents, and shareholders etc.) who have settled in actions against the respondents in the United States".

[18] The chambers judge also found that issues concerning the existence, scope, and duration of the alleged conspiracy were common across the class. However, he concluded, liability could not be established as a common issue.

[19] It was common ground that causally-connected damage is an element of the conspiracy actions at common law and under the *Competition Act*. In the view of the chambers judge, causally-connected loss or deprivation is also an element of the appellant's restitutionary claims. He concluded the appellant had not demonstrated that it could prove on common evidence that the price-fixed overcharge was passed

through the distributing and marketing chains and absorbed by the individual members of the class. As he put it,

[145] Specifically, the plaintiff's evidence does not satisfy its onus to demonstrate that harm, or its equivalent, can be established on a class-wide basis. In most of the causes of action pleaded, harm is a required element. In constructive trust based on unjust enrichment, a "corresponding deprivation" is a required element. Even under the doctrine of waiver of tort, the unlawful gain must be referable to the Class Members, as I will now explain. No methodology capable of providing this necessary link has been proposed. While that failure may not be fatal under the "common issues" criteria, it will likely doom the certification application to failure under the "preferable procedure" criteria.

[20] The chambers judge's explanation of the necessity in the restitutionary claims for a causal link between the unlawful gain and the effect of the conspiracy on the class members was founded on two Ontario judgments: the dissenting reasons of Chapnik J. in *Serhan Estate v. Johnson & Johnson* (2006), 269 D.L.R. (4th) 279 at para. 200, 85 O.R. (3d) 665 (Div. Ct.), leave to appeal ref'd [2006] S.C.C.A. No. 494 [*Serhan*], and on the reasons of Lederman J. in *Heward v. Eli Lilly & Co.* (2007), 45 C.P.C. (6th) 309 at paras. 26-28, 32 (Ont. S.C.J.) granting leave to appeal to the Divisional Court the decision of Cullity J. (2007), 39 C.P.C. (6th) 153 (Ont. S.C.J.) [*Heward*]. In *Serhan*, Chapnik J. observed in her dissenting reasons that a "calculable loss or ongoing deprivation" is a necessary element of a claim in unjust enrichment. In *Heward*, Lederman J. granted leave to appeal a claim in unjust enrichment and waiver of tort in which Cullity J. had certified the amount of the wrongful gain as a common issue. The chambers judge noted the reasoning of Lederman J. that "there must be a causal connection on a class-wide basis between the gain subject to disgorgement or constructive trust and the wrongful conduct" and that this causal connection had to extend to and affect the class members (paras. 110, 146). Accordingly, the chambers judge concluded,

[149] As a result, under waiver of tort or constructive trust by unjust enrichment the plaintiff is not relieved of the requirement to demonstrate that there is a methodology capable of proving on a class-wide basis that the alleged wrongful conduct (the alleged price-fixing conspiracy by the defendants in respect of DRAM products) caused a wrongful gain that arises from overcharges actually passed on to Class Members. The methodology must be capable of establishing not that there was an overcharge to direct

purchasers at the top of the distribution pyramid, but that there is a class-wide basis of establishing that an overcharge filtered down to and was borne by direct and indirect purchaser of DRAM products in British Columbia. The benefit the defendants are alleged to have gained must be referable to the Class Members. Liability to a class cannot be established based on wrongful conduct alone, but requires that the wrongful conduct actually impacted the class. The wrongful gain must arise from the class before the wrongdoer can be required to disgorge to the class. There is no principled basis to relieve the plaintiff from this requirement.

[150] Therefore, the invocation of the doctrine of waiver of tort or constructive trust by unjust enrichment does not enable the plaintiff to avoid the "common issues" requirement to demonstrate a methodology that will establish the pass through effect to Class Members on a class-wide basis. As the plaintiff states at para. 30 of its pleadings above, the overcharge must be "attributable to the sale of DRAM and products containing DRAM in British Columbia" (emphasis added). In order to have this action certified as a class action, the plaintiff must show that there exists a methodology capable of establishing this attribution on a class-wide basis.

[Emphasis in original.]

[21] The chambers judge went on to reject the appellant's submission that individual loss need not be proven for each class member to establish liability, that is, that the loss element of liability could be established on the basis of aggregate loss by using the aggregation provisions of the *CPA* to determine aggregate damages as the difference between the prices actually obtained by the respondents for DRAM and the prices they would have obtained but for their conspiracy. Relying on *Chadha v. Bayer Inc.* (2003), 223 D.L.R. (4th) 158, 63 O.R. (3d) 22 (C.A.) [*Chadha*], he concluded the aggregation provisions can be invoked only after liability has been established. He said,

[176] In my view, *Chadha* remains good law in precluding the plaintiff from resorting to the aggregation provisions of the Act to establish liability when there is otherwise no basis to do so, and I follow it. In this case, liability requires that a pass-through reached the Class Members. That question requires an answer before the aggregation provisions, which are only a tool to assist in the distribution of damages, can be invoked.

[22] Thus, in conclusion on the common issues requirement, the chambers judge said,

[177] Having failed to put forward any other means of proving the issue of liability on a class-wide basis, the plaintiff has failed to show that liability is a common issue in this case. It follows that the only common issues that could

be certified are the existence of a conspiracy to fix prices, and possibly breaches of the *Competition Act*. Thus, while the “common issues” criteria could be marginally satisfied by massively cutting down on the common issues certified, the lack of commonality of the central issue of liability will cause this certification application to founder at the “preferable procedure” stage that follows.

[23] Turning to the preferable procedure stage of the analysis, the chambers judge concluded that since individual inquiries would be required to determine individual damage and thus liability, the individual issues would overwhelm the remaining common issues. Accordingly, he said, a class proceeding would not promote access to justice or judicial economy (para. 188). Since the respondents had been subjected to criminal sanctions and had entered into settlements with direct purchasers of DRAM in the United States, he gave little weight to behaviour modification as a goal in this case (para. 192). He noted, as well, that the potential recovery for class members was very small and that access to justice therefore did not weigh heavily in the assessment. As a result, he concluded that a class proceeding was not the preferable procedure for the fair and efficient resolution of the remaining common issues (para. 194).

[24] He also decided the appellant was not a suitable representative for the class because it had “irreconcilable conflicts” with other class members in that its interest would lie in showing that it absorbed the overcharge to the exclusion of all other class members above it in its particular distribution chain (paras. 199, 202).

[25] He found the appellant’s litigation plan inadequate because of these “irreconcilable conflicts” and because it was “sparse”; and, since it assumed incorrectly that liability could be determined as a common issue, it was inadequate because it failed to address a number of “critical issues” involved in proving the individual issues (para. 205).

[26] As a result of these cumulative difficulties, he said, he was not satisfied the appellant was an adequate representative for the class (para. 206).

[27] Accordingly, he dismissed the certification application.

**Discussion**

The Standard of Review

[28] Section 4 of the *CPA* states that an action “must” be certified if all of the statutory criteria are satisfied. Accordingly, a judge on a certification application is not exercising a discretionary power in granting or refusing certification of an action as a class proceeding. However, the judge has a measure of discretion in the assessment of the statutory criteria and, absent an error of law, this Court will not interfere with an exercise of judicial discretion unless it is persuaded the chambers judge erred in principle or was clearly wrong: *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343, [1998] 6 W.W.R. 275 (C.A.) at para. 25, leave to appeal ref’d [1998] S.C.C.A. No. 13 [*Campbell*].

The Statutory Criteria

[29] The “cause of action” and “identifiable class” criteria for certification are not in issue on this appeal.

The Common Issues

[30] As noted, the chambers judge, relying on the reasons of Lederman J. in his leave decision in *Heward* and on the dissenting reasons of Chapnik J. in *Serhan*, concluded damage in the form of loss or deprivation resulting from the respondents’ wrongful conduct is an element of each class member’s claims in this case. However, damage may not be an element of the appellant’s restitutionary claims in unjust enrichment, constructive trust, and waiver of tort.

[31] In her majority judgment in *Serhan*, Epstein J. (now Epstein J.A.) surveyed the law relating to unjust enrichment, constructive trust, and waiver of tort and noted that there is an argument to be made that these claims may be established on the basis of proof of wrongful conduct and resulting gain without proof of any loss by the plaintiff. As she notes, this view finds support among some academic commentators and some case authorities and is based on the principle against unjust enrichment –

that a wrongdoer must be compelled to disgorge the fruits of the wrongdoing. These are benefit-based claims, as distinguished from loss-based claims such as claims in tort and contract, where the object is to compensate the innocent party for a loss.

Accordingly, she reasoned,

[157] Given the uncertain state of the law concerning both waiver of tort and the potential of disgorgement liability and the circumstances under which the remedy of a constructive trust may be recognized, it is not appropriate that the court should embark upon an analysis of this nature and significance at this early stage without a complete factual foundation. This is particularly so given the policy implications of the issues raised in this proceeding, implications for which the class proceedings regime in this province is specifically designed in that it is intended to provide a mechanism for correcting the behaviour of wrongdoers who would, absent its specialized procedures, be immune from legal consequences for their behaviour.

As a result, since liability might be established without proof of loss, she approved the certification of an aggregate award as a common issue (paras. 138-39).

[32] On the appeal in *Heward* ((2008), 295 D.L.R. (4th) 175, 91 O.R. (3d) 691 (Div. Ct.)), decided after the decision of the chambers judge in the case at bar, the Divisional Court affirmed certification of the amount of the wrongful gain as a common issue. In so doing, it contrasted (at para. 30) the approach taken by Mr. Justice Masuhara in the case at bar with the reasoning in *Serhan* and in *Peter v. Medtronic* (2008), 55 C.P.C. (6th) 242 (Ont. Div. Ct.) [*Peter*], which followed the approach set out in *Serhan* and certified an aggregate monetary award as a common issue. The Divisional Court in *Heward* adopted the reasoning of Cullity J. below at para. 101 of his reasons that causation could be proven for the class as a whole upon proof that the gain would not have been obtained but for the defendants' wrongful conduct. It implicitly rejected the view of Lederman J. in his leave decision that, since causation requires the further finding of a causal effect of the wrongful conduct on class members, an aggregate award could not be certified as a common issue. It also necessarily rejected the conclusion of the chambers judge in the case at bar that an aggregate award cannot be a common issue because proof of harm is a necessary element of liability in a claim of waiver of tort and the aggregation provisions of the *CPA* are not available until after liability has been established.

[33] Here, it may be possible for the appellant to prove that the respondents benefited from their wrongful conduct, and thus prove liability, without resort to statistical evidence. The fines agreed upon in the U.S. criminal proceedings against the respondents were assessed pursuant to 18 U.S.C. § 3571(d), which provided for maximum fines of twice the gross pecuniary gain the conspirators derived from the crime or twice the gross pecuniary loss caused to the victims of the crime. The respondents Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc., and Hynix Semiconductor Inc. agreed in their plea agreements that, if the charges had been tried, the United States would have presented evidence at trial to prove the gross gain or loss was sufficient to justify the agreed fine and waived their right to contest the calculation. In its plea agreement, Infineon Technologies AG agreed to pay “a criminal fine of \$160 million, pursuant to 18 U.S.C. § 3571(d)”. These respondents’ guilty pleas to the conspiracy charges and their agreement to pay fines calculated as a function of the gross pecuniary gain they derived from the crime amount to admissions that they engaged in the wrongful conduct alleged by the appellant and that they obtained an unlawful benefit from that conduct. Proof of these admissions would therefore establish liability in the restitutionary actions.

[34] The appellant contends it can prove on common statistical evidence that the respondents obtained a benefit attributable to this class from their unlawful conduct. It proposes to rely on expert economic evidence based on economic theory and statistical analysis to establish the prices the respondents would have received for DRAM absent their unlawful conspiracy. Then, by deducting what the respondents actually received from members of this class as determined from the respondents’ records, the appellant submits it will derive the amount of the unlawful gain attributable to this class. Accordingly, in the appellant’s submission, it will prove the respondents benefited from their conspiracy, thus establishing liability in the restitutionary claims, and, at the same time, it will prove the amount of the benefit.

[35] This approach to proof of causation on a class-wide basis has been approved in this province.

[36] In *Knight v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 172, 43 B.C.L.R. (4th) 169 [*Knight*], Satanove J. certified an aggregate monetary award for a common issue trial. In *Knight*, the plaintiff alleged the defendant had been guilty of deceptive advertising practices contrary to the provisions of the *Trade Practice Act*, R.S.B.C. 1996, c. 457 [*TPA*], and the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*]. The plaintiff claimed under s. 22 of the *TPA*, which authorized the court, upon finding the defendant had breached the provisions of the statute, to award “damages in the amount of any loss or damage suffered by [purchasers of the cigarettes] because of the deceptive ... act or practice” and under ss. 171(1) and 172(3) of the *BPCPA*, which authorized persons who have “suffered damage or loss due to a contravention of this Act” to bring an action against the defendant and authorized the court to order the defendant to “restore to [such persons] any money ... in which the person[s] ha[ve] an interest, that may have been acquired because of a contravention of this Act or the regulations”. The definitions of “deceptive acts or practices” in both statutes included deceptive representations. The plaintiff sought, among other things, an aggregate monetary award and sought to have the amount of the award certified as a common issue and to have it determined pursuant to the aggregation provisions of the *CPA*. The defendant argued the monetary claims could not succeed without proof of individual reliance on the deceptive acts by class members to establish a causal link between the deceptive acts and the loss or damage allegedly suffered. It submitted that these individual issues made the case inappropriate for certification. The plaintiff conceded causation was a necessary element of these claims but submitted it could prove the causal link by tendering economic and statistical evidence to demonstrate that “all class members paid too much for a product which did not truthfully exist” (para. 35). Accordingly, the plaintiff sought an aggregate monetary award to obtain the “disgorgement of revenues and profits earned by the defendant through the alleged deceptive marketing of the product” (para. 42). Madam Justice Satanove accepted this submission. She noted, “[t]he benefit to the defendant is measured by the sales of the product in British Columbia to the end user, the consumer” (para. 42). She concluded, “[t]here is no need for individual trials when the quantum of

such an economic claim can be proved for the class as a whole” (para. 51). Accordingly, she granted the plaintiff’s certification application.

[37] On appeal, this Court rejected the defendant’s submission that the chambers judge erred in certifying an aggregate monetary award as a common issue.

Mr. Justice Hall, writing for the Court, said,

[40] Although there may be elements of novelty and difficulty with the proposed methodology of damages calculation advanced by the respondent, it seems to me that it is appropriate for this issue to be left to be worked out in the laboratory of the trial court. Then, if and when the issue reaches this Court, we will have the benefit of a full record upon which to assess the appropriateness of any damages award that may be made pursuant to the proposed methodology.

[41] I would be reluctant at this stage of this proceeding to foreclose the respondent from litigating this issue as he proposes before the trial court. Accordingly, I would afford deference to the decision of the learned chambers judge to permit this damages issue to be litigated as a common issue.

[38] As I have noted, the chambers judge relied on *Chadha* for his conclusion that the aggregation provisions of the *CPA* cannot be used until after liability has been established. He purported to distinguish *Knight* from the case at bar. He said,

[173] At issue on the appeal [in *Knight*] ... was whether the aggregation provisions could be used to calculate and allocate damages *after liability* was already established.

[Emphasis in original.]

[39] In my view, the chambers judge misapprehended the decision in *Knight*. In *Knight*, this Court affirmed the certification of an aggregate monetary award under the *CPA* as a common issue in a claim for disgorgement of the benefits of the defendants’ wrongful conduct without an antecedent liability finding – rather, the aggregate assessment would establish concurrently both that the defendant benefited from its wrongful conduct and the extent of the benefit.

[40] I digress to note that much argument was addressed to us at the hearing of this appeal concerning the state of the law in Ontario in regard to whether aggregate monetary awards can be the subject of a common issues trial. In particular, there was disagreement as to whether the decisions in *Chadha* and *Markson v. MBNA*

*Canada Bank*, 2007 ONCA 334, 282 D.L.R. (4th) 385, are in conflict and, if so, as to which case correctly states the law in that province. The chambers judge was drawn into that dispute and discussed it in his reasons. As I have concluded that *Knight* settles the point in this province, I do not consider it necessary to address the submissions made concerning those cases.

[41] In my view, the relevant statutory language authorizes the use of statistical evidence to assess an aggregate monetary award in the circumstances of this case.

[42] Statistical evidence is admissible to prove the amount of the respondents' gain by virtue of s. 30(1) of the *CPA* if the three preconditions set out in s. 29(1) are satisfied.

[43] The first precondition is clearly satisfied here – monetary relief is claimed on behalf of some or all class members.

[44] The second requirement is that “no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant’s monetary liability”. As I have explained, the admissions inherent in the guilty pleas and the plea agreements in the U.S. criminal proceedings, if proven, would establish liability in the restitutionary claims, leaving nothing to be determined except the assessment of the amount of the respondents’ gain attributable to this particular class, if any, and its distribution. Accordingly, the second precondition is satisfied.

[45] The third requirement of s. 29(1) is that the aggregate of the defendants’ liability can reasonably be determined on common evidence. I turn now to that question.

[46] The total unlawful gain obtained by the respondents from sales of DRAM to class members would necessarily reflect the total loss suffered by the class. The appellant’s position was that the aggregate loss suffered by the class, as well as pass-through of the overcharge to indirect purchasers of DRAM, can reasonably be assessed on common evidence using well-accepted economic and statistical methods.

[47] The parties led affidavit evidence on this question at the certification hearing and filed transcripts of cross-examinations of their respective experts, both eminently qualified economists with expertise in the field of anti-competitive practices.

The Evidence

[48] The appellant's expert was Professor Thomas Ross. Appellant's counsel asked him the following questions:

1. Is it possible to assess whether direct purchasers of DRAM paid an overcharge due to cartel conduct?
2. Is it possible to quantify the price overcharge arising from any cartel conduct?
3. Is it possible to quantify how much of any overcharge was passed through to downstream purchasers of DRAM?
4. Is it possible to determine whether any DRAM price overcharge was passed through to downstream purchasers of DRAM?
5. What is your preliminary opinion regarding whether direct and indirect purchasers were damaged by the price overcharge arising from any cartel conduct?

[49] Dr. Ross answered the first four questions in the affirmative. He said the "application of standard and well-established economic principles and methods to the specific context of the DRAM market" would allow him to assess and quantify the overcharge paid by direct purchasers of DRAM and to assess the extent to which the overcharges were passed through to downstream purchasers of products containing DRAM, particularly computers. To the fifth question, he answered his "preliminary assessment" was that both direct and indirect purchasers of DRAM "were likely damaged by DRAM price overcharges".

[50] As to the aggregate loss, Dr. Ross opined that statistical regression analysis would provide an estimate of the price that would have been paid but for the cartel conduct and that the overcharge would be the difference between this price and what was actually paid. He added, "[W]ith good data and a well-understood market situation, I could provide a reasonable estimate of the overcharge".

[51] Turning to “pass-through”, he said, “[e]stimation of pass-through of cost increases is commonly done and well-established methods for estimating pass-through exist”. Again, he said, he would rely on statistical regression analysis.

[52] He said the necessary data for his analysis would be available from the respondents’ business records, from the information available in the U.S. class actions and criminal proceedings, from industry trade associations, from private information-vendors and consultants focusing on the electronics industry, and from import and export information collected by Statistics Canada.

[53] The respondents led factual evidence from five witnesses, a market research consultant and four employees or former employees of respondents. In essence, their evidence was that the markets for DRAM are very complicated, that DRAM is used in different ways in many different products, that some DRAM emanates from manufacturers other than the respondents, that it is difficult to determine the origin of the DRAM in any given product, that not all respondents sold DRAM directly into British Columbia during the class period, and that the pricing of DRAM is influenced by a multitude of factors.

[54] The appellant made no attempt to challenge this factual evidence with contrary evidence or by cross-examination of the deponents. As I understand him, counsel for the appellant considered any such attempt would be ineffective in the absence of a full factual investigation, aided by oral and documentary discovery, which he considered would not be economically viable at the pre-certification stage of the litigation and which, in any event, would be beyond the permissible scope of pre-certification discovery. In the latter regard, he referred to the fact that s. 2 of the *CPA* prescribes a short 90-day time limit for bringing a certification application, which implies that extensive pre-certification discovery is not contemplated, and to *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2007 BCSC 1663, 76 B.C.L.R. (4th) 171, a case alleging anti-competitive practices resulting in artificially high prices, where an application to obtain discovery of “all documents that are relevant to the certification issues” from U.S. litigation for the purpose of providing a factual basis for an expert opinion on pass-through was dismissed on the basis that pre-certification discovery

was restricted to documents that were “actually required” for the certification hearing and the plaintiff had failed to identify any such specific documents.

[55] The respondents’ expert, Margaret F. Sanderson, based her opinion in part on the factual evidence provided by the other defence witnesses. She opined essentially that, while what Dr. Ross proposed could be done in theory, it was not possible as a practical matter to assess harm on a class-wide basis given the complexities in the DRAM market described by the other defence witnesses. As for an assessment of aggregate gain or aggregate damages arising from the illegal conspiracy, she said the amount of data required for Dr. Ross’ approach is “enormous” and much of it is not publicly available, although she conceded in cross-examination that she had seen an expert assessment of aggregate harm prepared on behalf of one of the defendants in U.S. litigation and she understood such an assessment had been prepared for one of the plaintiffs. As well, she said, to the extent the respondents did not sell DRAM directly to persons in British Columbia, it would be necessary to identify the first indirect purchasers in British Columbia, a task she considered to be practically impossible. Further, she opined that the analysis of pass-through was simply too complex for a variety of reasons she specified.

[56] Dr. Ross responded that the assessment of the extent of pass-through would require simplifications and approximations but, he said, this is true of all economic analyses of markets. He acknowledged that Ms. Sanderson’s criticisms present difficulties but emphasized that they are not insurmountable. He said the complexity of the analysis can be reduced significantly with appropriate assumptions and the use of averages and explained how this could be done. In particular, he suggested it would be possible to confine his analysis to the market for personal computers and to use this analysis as a proxy for the other DRAM markets. He acknowledged these adjustments would affect the precision of his estimates but did not resile from his opinion that he would be able to derive reliable estimates. He discussed each of Ms. Sanderson’s criticisms and explained how he could deal with it in his analysis. He confirmed his belief that the necessary data would be available to him from the sources he identified.

The Standard of Proof

[57] The chambers judge set a high standard of proof for the appellant on this issue. He said,

[139] In a case such as this where the context is pass through, the court must be persuaded that there is sufficient evidence of the existence of a viable and workable methodology that is capable of relating harm to Class Members. This is not an application such as in *Vitapharm* where a settlement has been effected such that the threshold assessment can be “relaxed somewhat”: see *Furlan v. Shell Oil Co.*, 2002 BCSC 1577 at para. 11. Given the inherent complexities, the scrutiny cannot be superficial. The evidence must establish that the proposed methodology has been developed with some rigour and will be sufficiently robust to accomplish the stated task.

...

[141] I think it is obvious that an informed observer having an appreciation of: the dynamics of the market place generally; the DRAM industry specifically; the different forms of DRAM; the vast array of products that contain DRAM; the numerous and differing channels by which DRAM and products containing DRAM travel to reach intermediate and end markets and consumers; the number of participants at each level of distribution; and the numerous variables that can impact the price of a product containing DRAM, would not accept the proposition that it is possible to determine an overcharge to each indirect consumer in such a complex product and distribution context without serious scrutiny of the methodology. Dr. Ross’ opinion that “it is possible to assess and quantify the overcharge” to direct purchasers and passed through to downstream purchasers cannot simply be taken at first blush. If scrutiny is not conducted at this stage there is the real risk of dysfunction which cannot be in the interest of the litigants or the judicial process.

[58] He began his analysis by noting that a review of the evidence, including that of the “industry affiants”, confirmed the “considerable frailties and difficulties inherent in ... attempting to determine class-wide harm in cases such as this” (para. 152). He noted that Dr. Ross’ evidence was “not grounded in studies, company records, or industry data” and that his expertise in relation to “this industry ... was limited”. He marked the fact that the appellant had not led any factual “industry evidence” and had not challenged the respondents’ industry evidence. He observed that Dr. Ross had not done an analysis of the DRAM market and said Dr. Ross had “little knowledge” of whether the data necessary for his analysis “actually exists or is available to him”. He said, “Dr. Ross’ evidence is theoretical and is admitted to be general and preliminary” (para. 153).

[59] Further, he said Dr. Ross' suggestion that he could simplify the analysis by using the personal computer market as a proxy for other uses of DRAM was "not validated by empirical evidence" and that, because Dr. Ross had provided no factual foundation for such an extrapolation, "little confidence ... can be placed in the validity of this simplification". As well, he said, the evidence of Ms. Sanderson "erodes this theory" (para. 160).

[60] After setting out Ms. Sanderson's criticisms of Dr. Ross' suggested simplified approach (paras. 160-62), he observed,

[163] The record establishes a significant disparity in the level of industry knowledge and information between Dr. Ross vis-à-vis Ms. Sanderson and the other defence affiants that cannot be ignored. The weight of the evidence supports the contention of the defence that the simplification to use the PC channel as a proxy for the whole is not appropriate. In the absence of a higher degree of confidence in this fourth simplification, I am unable to place much confidence on Dr. Ross' proposed methodology.

[61] In that vein, he continued,

[164] While Ms. Sanderson acknowledged that simplifications are not uncommon in competitive analysis and that statistically significant sampling is often used, it is trite to say that the simplifications must be justifiable for the purpose for which they are being used. Class action litigation cannot be driven by the limitations of econometric tools and the data that are available or not; rather, the tools must be shown to be capable of meeting the evidentiary standard for the class and causes of action proposed.

[62] He observed further that statistical analysis must be "approached with caution" and that "[t]he correlations and results [of regression analysis] are subject to considerable interpretation and are not synonymous with causation in a legal context" (para. 165). Then, after noting certain concessions made by Ms. Sanderson, including that what Dr. Ross proposed was "theoretically possible", he rejected Dr. Ross' evidence and concluded the appellant had not shown that damage could be proven on a class-wide basis. He said,

[166] Even taking into consideration the acknowledgments of Ms. Sanderson in cross-examination such as the lack of substitutability of DRAM, the 70-80% market share of the defendants that give rise to the potential of market power; that the market share of the defendants grew during the Class Period; and that it is theoretically possible to estimate the extent of the pass-through under certain conditions; against the evidence of Dr. Ross which is

admitted to be general and preliminary; is not seasoned with industry knowledge or industry analysis; is premised on the need for considerable information which he was not able to state was available; requires analysis of pass through at every level of distribution channel for each product, and is hypothetical and simplified - not based upon real world economics; looking at the evidence overall, there are significant deficiencies regarding the approaches proposed by the plaintiff. It is apparent that the methods proposed by the plaintiff do not avoid the need for a vast number of individual inquiries regarding the participants and conditions in the market place for DRAM. As a result, I find that the plaintiff has not sufficiently demonstrated that a workable class-wide methodology is available to establish harm.

[63] In my view, this analysis set the bar for the appellant too high.

[64] The provisions of the *CPA* should be construed generously in order to achieve its objects: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby making economical the prosecution of otherwise unaffordable claims); and behaviour modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation): *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 26-29 [*Western Canadian Shopping Centres*]; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15 [*Hollick*].

[65] The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: *Hollick* at para. 16. The burden is on the plaintiff to show “some basis in fact” for each of the certification requirements, other than the requirement that the pleading disclose a cause of action: *Hollick*, at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one – it requires only a “minimum evidentiary basis”: *Hollick*, at paras. 21, 24-25; *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (S.C.J.) at para. 19. As stated in *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50 [*Cloud*],

[O]n a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

[66] Accordingly, where expert opinion evidence is adduced at the certification hearing, as it was here, it should not be subjected to the exacting scrutiny required at a trial. On this point, I adopt the remarks of J.L. Lax J. in *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.) at para. 76:

[76] The court's "gatekeeper" role in respect to expert evidence was clearly articulated by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 and urged upon trial judges in subsequent decisions. This role applies equally to judges hearing motions for certification: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 260 D.L.R. (4th) 488. However, where expert evidence is produced on a motion for certification, the nature and amount of investigation and testing required to provide a basis for a preliminary opinion will not be as extensive as would be required for an opinion to be given at trial. It follows that some lesser level of scrutiny is applied to the opinions offered, if they are otherwise admissible: *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 at para. 19 (Sup. Ct.).

[67] The chambers judge subjected the evidence of Dr. Ross to rigorous scrutiny. He weighed it against the respondents' evidence and against Ms. Sanderson's evidence in particular. In so doing, he failed to take into account that the factual evidence upon which Ms. Sanderson's opinion was based came in part from the respondents and was untested. Further, he failed to adequately consider that Dr. Ross' opinion was necessarily preliminary since the appellant has not yet had access to the information Dr. Ross needs to perform his analysis. In my view, this approach was fundamentally unfair at this stage of the proceeding, when the appellant has not had discoveries and an adequate opportunity to marshal the evidence required by Dr. Ross for his analysis.

[68] The appellant was required to show only a credible or plausible methodology. It was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases. Ms. Sanderson gave evidence that aggregate harm had been estimated by two experts in the U.S. litigation. As well, it appears from the U.S. plea agreements that the Department of Justice was prepared to prove that the

agreed fines were justified as representing twice the gross gain or the gross loss resulting from the price-fixing conspiracy. The dispute here is over whether total gain or loss can be determined as a practical matter on the particular facts of this case. Those facts have not yet been fully developed and it was therefore premature of the chambers judge to reject Dr. Ross' opinion. The close examination to which he subjected it should have been left for the trial judge, whose task it will be to evaluate the conflicting expert opinions and to decide what weight to give them. In my view, Dr. Ross' evidence met the low threshold required to establish for purposes of certification that gain and its counterpart, damage, can be shown on common evidence.

[69] It follows that the chambers judge erred in concluding that the assessment of the total gain to the respondents could not be tried as a common issue.

[70] As a result, since the gain obtained by the respondents will be the mirror image of the total loss suffered by the class, any legal objection to the use of the aggregation provisions of the *CPA* to assess aggregate damages in the conspiracy actions at common law and pursuant to the *Competition Act* would be of no practical importance. The common issues trial will have determined the respondents' wrongful conduct as common issues and, as a practical matter, will have determined the aggregate amount of the loss suffered by the class. It would then be open to the trial judge to distribute the award either by assessing loss on an individual basis, on an average or proportional basis pursuant to s. 32 of the *CPA*, or on a *cy-près* basis pursuant to s. 34(1), which provides for an order that an aggregate award be "applied in any manner that may reasonably be expected to benefit class or subclass members, even though the order does not provide for monetary relief to individual class or subclass members". In any case, the participation of the respondents would not be required beyond the common issues trial.

#### Preferability

[71] The Ontario Court of Appeal summarized the proper approach to the question of preferable procedure in *Cloud*:

[73] As explained by the Supreme Court of Canada in *Hollick, supra*, at paras. 27-28, the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice and behaviour modification, and must consider the degree to which each would be achieved by certification.

[74] *Hollick* also decided that the determination of whether a proposed class action is a fair, efficient and manageable method of advancing the claim requires an examination of the common issues in their context. The inquiry must take into account the importance of the common issues in relation to the claim as a whole.

[72] The chambers judge decided a common issues trial would not be the preferable procedure primarily because of his conclusion that proof of damage on an individual basis would be necessary. However, if liability in the restitutionary claims can be established at trial by proof of unlawful gain without individual proof of loss by class members, that objection evaporates. As I have noted, in that situation, everything but the allocation and distribution of any monetary awards could be decided on common evidence and, thereafter, questions of distribution of the disgorged profits could be determined without the participation of the respondents. Thus, contrary to the conclusion reached by the chambers judge, a common issues trial would serve the goal of judicial economy.

[73] The chambers judge did not consider behaviour modification an important goal in this case because the respondents have already been fined for their unlawful conduct and have settled with direct purchasers in class actions in the United States. In my view, he took a too narrow view of this goal. While the fines and the settlements may well serve to modify the behaviour of the respondents and to deter them from further such conduct, the chambers judge overlooked that the goal of behaviour modification also considers other potential wrongdoers. As McLachlin C.J.C. said in *Western Canadian Shopping Centres*,

[29] ... class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for

any one plaintiff the expense of bringing suit would far exceed the likely recovery.

[Emphasis added.]

[74] Further, he discounted the importance of access to justice, noting that value of any recovery would be small and in effect that the appellant's proposed *cy-près* distribution of any aggregate monetary award was an indication that individual access to justice was not a major concern. Again, I think he underestimated the importance of this goal. The fact that individual recoveries would be small weighs in favour of a class proceeding. It is unlikely that class members would pursue individual actions since the costs of doing so would be out of all proportion to the potential recovery. Further, it is premature to conclude that a *cy-près* distribution would be made and that individual class members would receive nothing. How an aggregate award might be distributed would be an issue for the trial judge to decide and, as I have observed, individual assessments or average or proportional awards would be available options.

[75] The chambers judge did not consider whether there were any other more practical or efficient means of resolving the appellant's claims and the respondents did not propose any. Thus, the only apparent alternative to a class action is no action at all. Therefore, if this action does not proceed as a class action there is the potential for an unconscionable result – that the respondents will be allowed to retain their unlawful gains. This potential unconscionability also weighs in favour of certifying this action as a class proceeding.

[76] I do not minimize the potential difficulties of proof arising out of the complexities involved in the marketing and distribution of DRAM. However, the *CPA* is a powerful procedural statute. It gives the case management judge flexible tools to deal with such complexities and if, despite this flexibility, it should turn out that a common issues trial is unmanageable, it gives the judge the power to decertify the action.

[77] In the result, I am satisfied that a trial of the common issues I have identified would be consistent with the goals of the class action legislation and would be a fair, efficient, and manageable way to adjudicate the appellant's claims. Such a trial has the potential to determine the entire case by resolution of the common issues.

Representative Plaintiff

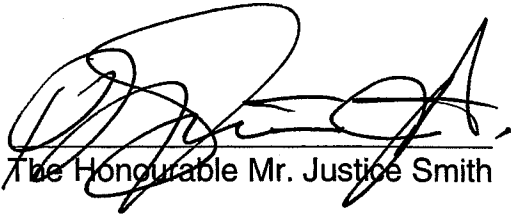
[78] The chambers judge concluded the appellant is not a suitable representative because of its conflict with other class members in its particular marketing chain on the issue of pass-through of the overcharge. I see that as a minor issue that may never be reached. The appellant shares a common interest with all class members in establishing the respondents' wrongful conduct and the aggregate amount of its unlawful gain. In my view, it is, at least at this stage, a suitable representative plaintiff.

Litigation Plan


[79] It is also my view that the appellant's litigation plan is sufficient at this stage. The chambers judge's opinion that there were unaddressed "critical" issues was informed by his conclusion that individual loss would have to be established to prove liability and damages. As I have explained, I do not agree. The plan may have to be amended as the action proceeds but that can be done under the supervision of the case management judge. As it stands, it does not disclose any weakness in the appellant's case that would suggest a class proceeding is not the preferable procedure: see *Cloud* at para. 95.

**Conclusion**

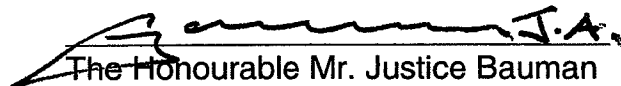
[80] I would allow the appeal, set aside the order refusing certification, and grant the application to certify the action as a class proceeding on terms consistent with these reasons.

  
The Honourable Mr. Justice Smith

I agree:

  
The Honourable Madam Justice Ryan

I agree:

  
The Honourable Mr. Justice Bauman